
2003 COMMERCIAL LAW DEVELOPMENTS

Steven O. Weise

HELLER EHRMAN WHITE & M^cAULIFFE LLP
Los Angeles, California

Jeffrey S. Turner

KAYE SCHOLER LLP
Los Angeles, California

Teresa Wilton Harmon

SIDLEY AUSTIN BROWN & WOOD LLP
Chicago, Illinois

WITH ASSISTANCE ON THE MATERIALS:

Sarah A. Toops

HELLER EHRMAN WHITE & M^cAULIFFE LLP
San Francisco, California

TABLE OF CONTENTS

	<u>Page</u>
I. PERSONAL PROPERTY SECURED TRANSACTIONS	1
A. Scope of Article 9 and Existence of a Secured Transaction.....	1
1. General.....	1
2. Consignments	2
3. Real Property	3
4. Intellectual Property	3
5. Leasing.....	4
6. Retention of Title.....	4
7. Sales.....	5
B. Security Agreement and Attachment of Security Interest	6
C. Description of Collateral and the Secured Debt – Security Agreements and Financing Statements	7
D. Perfection.....	8
1. Possession, Control and Other Perfection Methods	8
2. Preparation of Financing Statement.....	10
3. Filing of Financing Statement – Manner and Location, Lapse, Changes	11
E. Priority	12
1. Priority – Set-Off, Claims of Unsecured Third Parties, Buyers, and Rights of Holders of Non-UCC Liens	12
2. Priority – Competing Security Interests	14
3. Priority – Purchase Money Security Interests.....	14

4.	Proceeds.....	15
F.	Default and Foreclosure.....	17
1.	Default and Repossession of Collateral	17
2.	Retention of the Collateral in Satisfaction of the Debt.....	17
3.	Notice and Commercial Reasonableness of Foreclosure Sale.....	18
4.	Effect of Failure to Give Notice or to Conduct Commercially Reasonable Foreclosure Sale.....	20
G.	Transition	20
II.	REAL PROPERTY SECURED TRANSACTIONS.....	22
III.	GUARANTIES.....	23
IV.	FRAUDULENT TRANSFERS	24
V.	FINANCIAL INSTITUTIONS	25
A.	Regulatory and Tort Claims – Good Faith, Fiduciary Duties, Interference With Prospective Economic Advantage, Libel, Invasion of Privacy	25
B.	Lender’s and Borrower’s Obligations Under Securities and Corporate Laws	27
VI.	UCC - SALES AND PERSONAL PROPERTY LEASING	29
A.	Scope	29
1.	General.....	29
2.	Software and Other Intangibles	30
B.	Contract Formation and Modification; Statute of Frauds; “Battle of the Forms”; Contract Interpretation; Title Issues	30
1.	General.....	30
2.	Battle of the Forms	31
C.	Warranties and Products Liability.....	31

1.	Warranties	31
2.	Limitation of Liability	33
3.	“Economic Loss” Doctrine	33
D.	Performance, Breach and Damages	34
E.	Personal Property Leasing	35
VII.	COMMERCIAL PAPER, ELECTRONIC FUNDS AND TRANSFERS	37
A.	Negotiable Instruments and Holder in Due Course	37
C.	Payment-in-Full Checks	38
D.	Electronic Funds Transfer	39
E.	Usury	39
VIII.	LETTERS OF CREDIT, INVESTMENT SECURITIES, AND DOCUMENTS OF TITLE	41
A.	Letters of Credit	41
B.	Investment Securities	41
C.	Documents of Title	42
IX.	CONTRACTS	43
A.	Formation, Scope, and Meaning of Agreement	43
B.	Releases, Exculpation and Indemnity Clauses	44
C.	Adhesion Contracts, Unconscionable Agreements, and Other Public Policy Limits, Interference with Contract	44
D.	Jurisdiction, Choice of Law and Choice of Forum	45
E.	Arbitration	45
F.	Damage	46

X.	OTHER LAWS AFFECTING COMMERCIAL TRANSACTIONS	48
A.	Bankruptcy Code	48
B.	Consumer	52
C.	Professionals	53

I. PERSONAL PROPERTY SECURED TRANSACTIONS

A. *Scope of Article 9 and Existence of a Secured Transaction*

1. *General*

- *Peoples v. Sebring Capital Corp.*, 52 Fed. R. Serv. 3d 197 (N.D. Ill. 2002) – The uniform adoption of revised Article 9 supported the certification of a class action based on violations of revised Article 9 under the law of many states.
- *Carroll v. Interstate Brands Corporation*, 99 Cal.App.4th 1168, 02 C.D.O.S. 5958 (2002) – An attorney’s lien is created by contract and the attorney does not have to give notice of the lien to make it enforceable.

Comment: The court did not take into account revised Article 9, which provides for a security interest in a commercial tort claim. Under revised Article 9, a security interest can be created in a commercial tort claim and is enforceable against the owner of the tort claim without any public filing. The filing of a financing statement would be necessary to perfect the security interest and to give the secured party priority over a lien creditor or another secured party that perfects its security interest.

- *In re Pacific/West Communications Group, Inc.; Fifteenth RMA Partners, L.P. v. Pacific/West Communications Group, Inc.*, 301 F.3d 1150 (9th Cir. 2002) – Under former Article 9, the court held that a secured party could not obtain a security interest in a tort claim, either under former Article 9 or outside of former Article 9.

Comment: The court got several things wrong. It stated that former Article 9 “prohibited” a secured party from obtaining a security interest in a tort claim. Former Article 9 only excluded tort claims from the coverage of Article 9 and send a secured party to non-Article 9 law for its rights. The court was wrong to hold under former Article 9 that a secured party could not obtain a security interest in the proceeds of an excluded tort claim even if the security agreement and financing statement correctly described the proceeds

as original collateral. Finally The court was also wrong in its holding that under revised Article 9 a secured party could only obtain a security interest in the proceeds of a tort claim, but not the tort claim itself. Revised Article 9 permits a security interest in a “commercial” tort claim. UCC § 9-109(12).

- *In re Cypress Foods, Inc.*, 278 B.R. 622 (M.D. Florida 2002) – A claim under an insurance policy for the return of unearned premiums may not be a “claim under a policy of insurance” excluded by UCC § 9-109(d)(8).
- *Surgicore, Inc. v. Principal Life Insurance Co.*, 2002 WL 1052034, 48 UCC Rep Serv 2d 736 (N.D. Illinois 2002) – A health-care provider received from its patients an assignment of the patients’ claims against a health-care insurer. When the insurer denied the claims, the health-care provider brought an action against the insurer, arguing that revised Article 9 covered the assignment of the health-care-insurance receivable (UCC § 9-102(a)(47)) and that the provider could collect from the insurer as an account debtor. UCC § 9-607. The court held that ERISA preempted the application of Article 9 to this transaction.

2. *Consignments*

- *In re Valley Media, Inc.*, 279 B.R. 105 (Bankr. D. Del. 2002) – Consignors of goods (compact disks containing music) did not file a financing statement against the consignee to give notice of their rights. The court correctly held that the consignors retained title to the goods. However, that does not answer the question of whether the creditors of the consignee could assert claims against the consigned goods and thus whether a trustee in bankruptcy could assert rights as a judicial lien creditor under Bankruptcy Code § 544. The consignors argued that the consignee was a “merchant” that was “generally known by its creditors to be substantially engaged in selling the goods of others” under former UCC § 2-326 and revised UCC § 9-102(a)(20). The consignee was a division of a larger company. The court correctly held that the larger company was the debtor because the division was not a separate “person.” UCC § 1-201(30). The consignors were unable to satisfy the “generally known” test for

the larger company. Further the consignees were entitled to make the “first sale” of the CDs without violation of the copyrights of the consignor.

- *Furr v. The Corvette Experience, Inc.*, 294 B.R. 409, 51 UCC Rep Serv 2d 426 (Bankr. S.D. Fla. 2003) – Goods were “delivered” to consignee for purposes of former UCC § 2-326. Creditors of consignee had priority in goods against consignor that had not taken steps to protect its interests by filing a financing statement. Former UCC § 2-326.

3. *Real Property*

- *In re Richards*, 275 B.R. 586 (Bankr. D. Colo, 2002) – The UCC, and not real property law, governs the attachment of a security interest in a note secured by a real property mortgage. UCC § 9-109(b). The attachment of the security interest to the note also automatically attaches to the debtor’s interest in the mortgage. UCC § 9-203(g).

4. *Intellectual Property*

- *Kelly v. Arriba Soft Corporation*, 336 F.3d 811 (9th Cir. 2003) – The copying of copyrighted photographs from photographer’s website and the display of those images as “thumbnails” on the site of an operator of a search engine displaying results as images (rather than text), was a non-infringing “fair use” of the copyrighted materials under Section 107 of the Copyright Act.
- *In re Pasteurized Eggs Corp.*, 2003 WL 21474218, 51 UCC Rep Serv 2d 274 (D. New Hampshire 2003) – Secured party must file a financing statement to perfect a security interest in patents and a filing with the PTO does not perfect the security interest.
- *Harold L. Bowers (dba HLB Techonolgy) v. Baystate Technologies, Inc.*, 320 F.3d 1316 (Fed. Cir. 2003) – A party to a software agreement may agree to tighter restrictions on reverse engineering than would be imposed by the Copyright Act itself.
- *Kabehie v. Zoland*, 102 Ca.App.4th 513 (C.A. 2002) – Contract claims that pertain to copyrights are not preempted by federal copyright

law to the extent they require elements that are qualitatively different from claim that would be brought under Copyright Act.

5. *Leasing*

- *Duke Energy Royal, LLC v. Pillowtex Corporation (In re Pillowtex, Inc.)*, 349 F.3d 711 (3d Cir. 2003) – A master services agreement between a debtor and an equipment seller was a disguised financing and not a true lease. The court rejected a test based solely on the intentions of the parties and instead applied three economic factors – whether (i) the lessee’s purchase option is nominal, (ii) the lessee was required to make lease payments with a present value equal to or exceeding the original cost of the leased property, and (iii) the lease term covered the entire useful life of the equipment. Thus the “lessee” was not compelled to make lease payments under the agreement during its bankruptcy proceedings.
- *In re QDS Components, Inc.*, 292 B.R. 313, 50 UCC Rep Serv 2d 973 (Bankr. S.D. Ohio 2002) – “Lease” was a true lease where the option price to purchase the leased goods was not “nominal.” UCC § 1-201(37).
- *In re Rebel Rents, Inc., Zions Credit Corporation v. Rebel Rents, Inc.*, 2003 WL 1869889, 50 UCC Rep Serv 2d 352 (C.D.Cal 2003) – “Leases” were not disguised secured transactions where the leased goods had significant value at the end of the lease and the buyer did not have an option to purchase the leased goods.

6. *Retention of Title*

- *Arcadia Financial, Ltd. v. Southwest-Tex Leasing Co.*, 78 S.W. 3d 619, 47 UCC Rep. Serv. 2d 1371 (Tex. App. 2002) – A wholesaler sold and delivered cars to a retailer and the retailer granted a security interest in its inventory to a secured party. The agreement between the wholesaler and the retailer provided that the retailer did not obtain title to the cars until the retailer had paid for them. The court held that the secured party’s security interest could not attach to the cars that the retailer had not paid for because title had not transferred to the retailer.

Comment: Under UCC § 2-401, whatever the parties agree, ownership of the cars transferred to the retailer and the retailer could have granted a security interest in the cars.

- *Usinor Industeel v. Leeco Steel Products, Inc.*, 209 F. Supp. 2d 880, 47 UCC Rep. Serv. 2d 887 (N.D. Ill. 2002) – A seller of goods purported to retain title to the goods until the buyer paid in full for them. A secured party of the buyer had a perfected security interest in the goods. The seller's purported retention of title was limited to a security interest in the goods. UCC § 2-401(a). The seller had not perfected that security interest and its security interest was junior to the perfected security interest of the buyer's secured party. UCC § 9-322(a)(2). The court also held that although the Convention on Contracts for the International Sale of Goods applied to the transaction between the seller and the buyer, it did not affect the rights of third parties, such as the buyer's secured party.
- *Dean Machinery Co. v. Union Bank*, 2003 WL 1872958, 50 UCC Rep Serv 2d 431 (Mo.App. 2003) – A seller of equipment attempted to retain title to the equipment until the buyer completed paying for it. The UCC treats a conditional sale as a sale coupled with the retention of a security interest. UCC § 2-401. Where the seller did not file a financing statement to perfect this security interest, the seller's unperfected security interest was junior to the security interest of another secured party of the buyer. The seller could not bring a conversion claim against the other secured party when the other secured party sold the goods upon the foreclosure of its security interest.

7. *Sales*

- *Carter v. Four Seasons Funding Corporation*, 97 S.W.3d 387 (Ark. 2003) – A factoring arrangement constituted a true sale, not a disguised lending arrangement, for purposes of applying state usury laws. The court evaluated various aspects of the transaction, including whether the “seller” had control over when the account debtors would pay, to what extent there was recourse for defaulted receivables, whether the obligors were given notice of the change in ownership and the intent of the parties.

Comment: The court should have paid more attention to the fact that there was recourse for receivables that were not paid within 90 days.

- *Reaves Brokerage Company, Inc. v. Sunbelt Fruit & Vegetable Company, Inc.*, 336 F.3d 410, 2003 U.S. App. LEXIS 12977 (5th Cir. 2003) – Transfer of accounts was not a “true sale” where the complex terms of the agreement meant that the “seller” would “virtually always” have liability for recourse if the account debtors did not pay.

B. *Security Agreement and Attachment of Security Interest*

- *In re Kellstrom Industries, Inc.*, 282 B.R. 787, 48 UCC Rep. Serv. 2d 613 (Bankr. D. Del. 2002) – The rights of a secured party of a buyer as against the rights of a seller to the buyer to withhold delivery of goods to the buyer are no better than the buyer’s rights. UCC §§ 2-403, 9-110, Comment 5. An unpaid seller may withhold delivery. UCC § 2-702. Thus the secured party of the buyer was subject to the seller’s right to withhold delivery.
- *Security National Partners, Limited Partnership v. Baxley*, 859 So. 2d 890 (La. Ct. App. 2 Cir. 2003) – The creation of a security interest in a right to payment supported by a supporting obligation or secured by other collateral also creates a security interest in the supporting obligation and the debtor’s security interest in the other collateral. UCC § 9-203(f), (g). The debtor granted a security interest in a promissory note itself secured by a security interest in a collateral mortgage note. The original secured party sold the promissory note (creating a “security interest” under Article 9) to another secured party. The court held that the security interest in the collateral mortgage note – including the mortgage itself – had been transferred to the bank.

Comment: Unfortunately, the court focused its analysis on UCC § 9-203(f) – which covers supporting obligations – and did not mention the more relevant UCC § 9-203(g) – which covers security interests supporting rights to payment.

- *Bank of Am. v. Moglia*, 330 F3d 942 (7th Cir. 2003) – The assets of a “rabbi trust,” created by a corporation for the benefit of an executive, are excluded from a security interest where the trust was funded before a security agreement was executed.

- *In re Midland Transportation Co., Forker v. Prins Insurance Co. Inc.*, 292 B.R. 181, 50 UCC Rep Serv 2d 579 (Bankr. N.D. Iowa 2003) – In the absence of an authenticated security agreement or the secured party's possession of the collateral, a security interest did not attach to the collateral. UCC § 9-203.
- *In re E-Z Serve Convenience Stores, Inc.*, 2003 WL 22159042, 51 UCC Rep Serv 2d 858 (Bankr. M.D.N.C. 2003) – A bankruptcy debtor's unearned retainer fee for its counsel was a pre-petition general intangible and the debtor's secured party, with a perfected security interest in "general intangibles," was entitled to claim the unearned portion as collateral.
- *Pride Hyundai, Inc. v. Chrysler Financial Co., LLC*, 2003 WL 21242649, 51 UCC Rep Serv 2d 247 (D. Rhode Island 2003) – The court enforced "dragnet clause" securing all obligations of debtor to secured party by the collateral described in the security agreement, even though debtor testified that it did not "intend" to have all obligations secured by that collateral.

C. *Description of Collateral and the Secured Debt – Security Agreements and Financing Statements*

- *Grabowski v. Deere & Company*, 277 B.R. 388 (Bankr. S.D. Ill. 2002) – A secured party obtained a security interest in the debtor's equipment. The secured party filed a financing statement that described the collateral as "all . . . equipment." The court applied revised Article 9 even though the financing statement had been filed prior to the effective date of revised Article 9. UCC § 9-702(a). The court correctly notes that the purpose of a financing statement is to give "notice" of the security interest. The observed that UCC § 9-108 allows a description of collateral by "type" and that for a financing statement Article 9 imposes an "even broader standard." Further "this exceedingly general standard" does not require an itemization of the collateral. Thus the court correctly rejected the claim of a junior secured party that that the description was inadequate.

Comment: The court did not mention UCC § 9-705(c), which continues the effectiveness of an effective financing statement filed under former Article 9. It does not make any difference here because, correctly

- applied, the tests for the indication of collateral under former Article 9 and under revised Article 9 are the same.
- *Deere Credit, Inc. v. Pickle Logging, Inc. (In re: Pickle Logging, Inc.)*, 286 B.R. 181 (Bankr. M.D. Ga. 2002) – The collateral description in a security agreement and financing statement was not sufficient as to an item of collateral because the description contained a typo in a serial number for that item of collateral that would have caused third parties to believe that the security interest covered a different piece of equipment.
 - *Silver v. Wilson (In re: Estate of Silver)*, 2003 Mich. App. Lexis 1389, 50 UCC Rep. Serv. (Callaghan) 2d 1196 (Mich Ct.App. 2003) – The debtor hung paintings in model homes, condos, and company offices. The debtor did not hang the paintings in the debtor’s personal office or home. The paintings were “equipment.” UCC § 9-102(a)(33).
 - *Fifth Third Bank v. Comark, Inc.*, 2003 WL 21699896, 51 UCC Rep Serv 2d 533 (Ind.App. 2003) – A security agreement and financing statement referred to computer “equipment” as “inventory.” The description in the security agreement was sufficient because of specific references to the “computers.” Similarly, although an objective test applies to an indication of collateral in a financing statement, the specific references to the “computers” were sufficient notice of the security interest in those items for purposes of the financing statement.
 - *In re Invenux, Inc.*, 298 B.R. 442 (Bankr. D.Co. 2003) – Common law right of reformation of agreement due to mutual mistake can apply to the description of collateral in a security agreement.

D. *Perfection*

1. *Possession, Control and Other Perfection Methods*

- *In re AvCentral, Inc.*, 289 B.R. 170 (Bankr. D. Kan. 2003) – Although the owner of an aircraft intended to take apart the plane and sell the parts as inventory, at the time of the transaction the plane was still whole and was an “aircraft” subject to the filing requirements of Federal law. 49 USC § 44107(a)(1). The secured party did make the property filing under Federal law and had a perfected security interest. Article 9 defers to a Federal filing rule. See UCC § 9-311(a)(1).

The court correctly holds that the exception to non-UCC filing rules in UCC § 9-311(d) for certain kinds of inventory does not apply when Federal law preempts Article 9's filing rules.

Comment: In a dictum, the court incorrectly states that revised Article 9 did not change the place to file a financing statement to perfect a security interest in inventory. The court was not correct to refer for purposes of perfection to the choice-of-law provisions in the security agreement and the location of the collateral. UCC §§ 9-301, 307.

- *In Ferris, Baker Watts, Inc. v. Stephenson (In re: MJK Clearing, Inc.)*, 293 F.Supp.2d 1003, No. 02-4775 RHK, 2003 U.S. Dist LEXIS 5954 (D. Minn. April 7, 2003) - The court analyzed the application of Article 9 to a stock loan transaction. In the case, FBW borrowed shares from MJK and posted cash collateral to secure its return of the shares. The share-lending arrangement gave MJK the right to use or invest the cash collateral at its own risk or to pledge, repledge, rehypothecate or otherwise transfer the collateral. MJK did use the cash to settle its account at DTC. The shares ended up being worthless, MJK went bankrupt, and FBW sued to get its cash back on the theory that the cash was not property of the estate or that a constructive trust should be established. The court held that FBW should not have given MJK the right to use the cash.
- *In re Morgan*, 291 B.R. 795, (Bankr. E.D. Tenn. 2003) - Where a state has a certificate-of-title law that provides for the notation of a security interest on the certificate, the only way to perfect a security interest in a titled vehicle is by that notation. UCC § 9-311(a)(2). The filing of a financing statement is ineffective, except when the vehicles are held as inventory by a person in the business of selling those vehicles. UCC § 9-311(d).
- *First National Bank of the North v. Automotive Finance Corp.*, 2003 WL 21219989, 50 UCC Rep Serv 2d 915 (Minn.App. 2003) - A secured party perfected a security interest in a motor vehicle by filing under the certificate of title law. The owner of the vehicle then traded it in and the motor vehicle dealer held the car as inventory. The secured party did not have to file a financing statement to re-perfect its secu-

rity interest as the motor vehicle dealer took the motor vehicle subject to the perfected security interest. UCC § 9-311.

2. *Preparation of Financing Statement*

- *In re Erwin*, 2003 WL 21513158, 2003 Bank. Lexis 692, 50 UCC Rep Serv. 933 (Bankr. D. Kansas 2003) – An individual debtor’s name was “Michael A. Erwin.” A secured party filed a financing statement that showed the debtor’s name as “Mike Erwin.” A search under the debtor’s full name did not locate the financing statement. Searches under “Erwin” or “M. Erwin” did locate the financing statement. The court first addressed the transition rules of Part 7 of revised Article 9. It held that a financing statement filed before the effective date of revised Article 9 remained effective after the effective date for only one year unless the financing statement met the requirements of revised Article 9. The court then considered whether the financing statement met the requirements of revised Article 9. The court recognizes that a debtor’s name is *per se* seriously misleading if the debtor’s name does not comply with UCC § 9-503(a), unless a search using the filing office’s standard search logic would locate the financing statement. The court held that the only “critical” part of an individual debtor’s name is its last name. The further held that “some aspect of the “reasonably diligent searcher” rule survived the adoption of revised Article 9.

Comment: The court was wrong on all counts. A financing statement filed prior to the effective date of revised Article 9 that was effective to perfect a security interest under former Article 9 remains effective to perfect a security interest after the effective date even if it does not satisfy the requirements of revised Article 9. UCC § 9-705(c). That financing statement remains effective until the earlier of when it would otherwise lapse or June 30, 2006. revised Article 9 requires “the” name of the debtor and a nickname is not sufficient. The so-called “reasonably diligent searcher” rule did not survive the adoption of revised Article 9.

- *In re Spearing Tool & Mfg. Co.*, 302 B.R. 351 (E.D. Mich. 2003) – A debtor’s name was “Spearing Tool and Manufacturing Co.” The IRS filed a Federal tax lien filing showing the debtor’s name as “Spear-

ing Tool & MFG Company, Inc.” A secured party did a financing statement search and did not locate the Federal tax lien filing under the filing office’s standard search logic. The court concluded that the name used on the filing would have failed the debtor name test of UCC § 9-503(a)(1) and the standard search logic test of UCC § 9-506(c). The court held that the IRS had to use a name that a “reasonable” search would locate. The court in effect held that the UCC provided the rules for that purpose. Thus the secured party had priority.

- *In re Kinderknecht*, 2003 WL 22345663, 51 UCC Rep Serv 2d 1234 (Bankr. D.Ks. 2003) – The use of debtor’s nickname was sufficient for financing statement even though a search under the debtor’s legal name (“Terrance”) using the standard search logic of the filing office does not find the financing statement.

3. *Filing of Financing Statement – Manner and Location, Lapse, Changes*

- *In re Hergert, Hergert v. Bank of the West*, 275 B.R. 58, 47 UCC Rep Serv 2d 1 (D. Idaho 2002) – A secured party perfected its security interest by filing a financing statement. Another entity then acquired the secured party and the name of the secured party changed as part of the acquisition. The court correctly held that the name change did not render the financing statement insufficient where the financing statement was sufficient at the time the financing statement was filed. The court also correctly held that under the revised Article 9 transition rules, a financing statement that was effective to perfect a security interest under former Article 9 remains effective until it would otherwise lapse (without continuation). UCC § 9-703(a). However, the court held that with the address change a searcher would not have been able to track down the secured party and thus the financing statement may have become ineffective under former UCC § 9-402(8). However, the court correctly observed that changes to the secured party’s name and address never render a financing statement insufficient under revised Article 9. UCC § 9-506.

Comment: A mistake in a secured party’s name on a financing statement should never render the financing statement insufficient to perfect the security interest. UCC § 9-506, Comment 2. The

court's conclusion concerning former Article 9 is questionable, as is its reservation of the question of whether the combination of the name and address change was "seriously misleading." The only change in the information in a financing statement that can render the financing statement insufficient is a change in the name of the debtor. A secured party that does have a name change or an address change may want to amend its financing statement so that it will receive notices of foreclosure sales under UCC § 9-611(c)(3)(B) and PMSI notices under UCC § 9-324(b)(2).

- *General Electric Capital Corporation v. Dial Business Forms, Inc., (In re Dial Business Forms, Inc.)*, 341 F.3d 738, 51 UCC Rep Serv 2d 815 (8th Cir. 2003) – A secured creditor failed to file continuation statement during the debtor's bankruptcy proceeding, but the secured party's security interest maintains its priority because of language in the debtor's Chapter 11 plan.

Comment: Bankruptcy Code § 362(b)(3) allows the filing of a continuation statement during the debtor's bankruptcy.

- *Ainslie v. Inman*, 577 S.E.2d 246 (2003) – Under former Article 9, a lapsed financing statement caused the security interest to be unperfected against a lien creditor. It does not matter that the secured party obtained a judgment on the security interest prior to the lapse of the financing statement.

E. *Priority*

1. *Priority – Set-Off, Claims of Unsecured Third Parties, Buyers, and Rights of Holders of Non-UCC Liens*

- *Systran Financial Services Corp. v. Giant Cement Holding, Inc.*, 252 F. Supp. 2d 500, 50 UCC Rep Serv 2d 305 (N.D. Ohio 2003) – Revised Article 9 applied to a sale of accounts. UCC § 9-109(a)(3). The buyer's rights were subject to the account debtor's rights under the assigned contract, including the account debtor's right to require arbitration of disputes under the agreement. UCC § 9-404(a)(1).

Comment: It seems likely that the same result would also occur under the general law of contracts.

- *In re Communications Dynamics, Inc.*, 300 B.R. 220 (Bankr. Del. 2003) – An unsecured creditor downloaded a credit report noting another creditor’s security interest in a debtor’s assets. The court held that the unsecured creditor had received an “authenticated” notice of the secured creditor’s security interest, thus placing the unsecured creditor on notice of the security interest and the unsecured creditor from setting off against the debtor’s accounts. UCC § 9-404(a)(2). However, a right of recoupment (which is a defense arising out of the same transaction) may be asserted against a secured creditor’s security interest even after receipt of notice. UCC § 9-404(a)(1). The unsecured creditor successfully established that its rights under a master distribution agreement were recoupment rights, even though the creditor’s claims against the debtor arose from different sales of equipment than the debtor’s claims against the creditor.
- *In re Doctors Hospital of Hyde Park, Inc.*, 2003 WL 21730747, 51 UCC Rep Serv 2d 224 (7th Cir. 2003) – State law allowing state to set off against Medicaid contract taxes owed by debtor was enforceable against assignee of the Medicaid claim, even though the taxes arose under a different agreement. Former UCC § 9-318.
- *Bank One, N.A. v. The First National Bank of Baird*, 2003 WL 22137171 (N.D.Tx 2003) – Bank’s common law and statutory rights of set off came ahead of a secured party with a perfected security interest in a deposit account where the secured party did not have control of the deposit account through becoming the depository institution’s customer and did not have an agreement giving it (the secured party) priority. UCC § 9-340.
- *Consolidated Nutrition, L.C. v. IBP, Inc.*, 2002 WL 32153954, 51 UCC Rep Serv 2d 329 (South Dakota Supr.Ct. 2003) – Rights to set off are not dependent on compliance with Article 9 attachment and perfection rules. However, Article 9 priority rules may still apply to the ability to exercise a right to set off. Former UCC § 9-318.
- *Watkins v. GMAC Financial Services*, 337 Ill.App.3d 58, 271 Ill.Dec. 389, 785 N.E.2d 40, 50 UCC Rep Serv 2d 899 (Ill.App.1st 2003) – Attorney holding unperfected attorney’s lien in collateral was junior to

secured party that had a perfected security interest in the same collateral.

- *Chicago District Council of Carpenters Pension Fund v. Tessio Construction Co.*, 203 WL 21312664, 51 UCC Rep Serv 2d 268 (N.D. Ill 2003) – Secured party's security interest in accounts was senior to judgment lien of creditor where security interest had attached before judgment lien came into effect. It did not matter that secured party may not have exercised due diligence to learn about the possible judgment lien.

2. *Priority – Competing Security Interests*

- *In the Matter of Argo Financial, Inc., Advanta Auto Finance Corp. v. Sugarland Motor Co., Inc.*, 2003 WL 21536985, 51 UCC Rep Serv 2d 282 (5th Cir. 2003) – A car dealer sold cars and took back retail installment contracts. The car dealer then sold the chattel paper to a buyer. The buyer in turn used the chattel paper as collateral for a loan and the buyer's secured party perfected its security interest in the chattel paper. The buyer failed to pay the dealer for the chattel paper and the dealer sought to dissolve the contracts. The secured party of the buyer had priority in the chattel paper and the cars (as collateral for the obligations under the chattel paper).

3. *Priority – Purchase Money Security Interests*

- *Key Bank Nat. Ass'n v. Huntington Nat. Bank*, 47 UCC Rep Serv 2d 837 (Court of Appeals of Ohio 2002) – A purchase-money debt was secured both by purchase-money collateral and by non-purchase-money collateral. The court applied the “dual-status” rule, rejected the “transformation” rule, and held that the existence of non-purchase-money collateral did not taint the existence of the PMSI. Although former Article 9 applied to the dispute because the matter was pending on the effective date of revised Article 9, the court noted that revised UCC § 9-103(f) “definitively eradicates” the “transformation” rule. UCC § 9-702(c). The court also correctly held that a security agreement and financing statement do not have to contain a specific list of the purchase-money collateral.

- *In re K & P Logging, Inc., Bank of America, N.A. v. Case Credit Corp.*, 272 B.R. 867, 47 UCC Rep Serv 2d 731 (Bankr. D. S.C. 2001) – The court applied the “dual-status” rule and held that a PMSI secured party could have both a “purchase-money” and a non-purchase money security interest in the purchase money collateral without losing the PMSI status of the security interest to the extent the collateral secured its own purchase price. The court noted that revised Article 9 adopted the “dual-status” rule and rejected the “transformation” rule. The court also correctly held that a financing statement could perfect a security interest pursuant a security agreement that had not been entered into or contemplated at the time the financing statement was filed.
- *In re Custer*, 2003 Bankr. LEXIS 272, 50 UCC Rep Serv 2d 608 (Bankr. N.D. Iowa 2003) – UCC § 9-317(e) provides that a secured party holding a PMSI defeats the rights of an intervening buyer, lien creditor, and lessee of the debtor if the secured party files a financing statement within 20 days of the debtor receiving delivery of the collateral. Here the secured party did not perfect the security interest within the 20 days and the rights of the debtor’s trustee in bankruptcy (as a “lien creditor”) were superior to those of the secured party. The court noted that even though the rights of the trustee arose during the 20-day period, the secured party still could have protected itself by a timely filing without violation of the automatic stay. Bankruptcy Code § 362(b)(3).
- *First Bethany Bank & Trust, N.A. v. Arvest United Bank*, 2003 WL 21448549, 50 UCC Rep Serv 2d 1209 (Ok.Supr.Ct. 2003) – A PMSI super-priority was not available for a security interest in accounts because they were not subject to “possession” under former UCC § 9-312. The same result applies under revised Article 9. UCC § 9-324.

4. *Proceeds*

- *In re Stallings*, 290 B.R. 777 (Bankr. D. Idaho 2003) – A secured party had a security interest in crops. Herbicides blew onto the debtor’s fields and damaged the crops. After the debtor filed for bankruptcy, the Federal government created a crop disaster program that in-

cluded a payment to the debtor for “reimbursement for crop damage.” The court held that the secured party was not entitled under Bankruptcy Code § 552 to the payments as “proceeds” of the crops because the payment was for crops *not* grown.

- *In re Wiersma*, 283 B.R. 294, 49 UCC Rep. Serv. 2d 309 (Bankr. D. Idaho 2002) – A debtor granted a security interest in its cows and general intangibles. The debtor hired a contractor to perform electrical services. The services were defective and the cows were injured. The court held that the claim against the contractor was a “contract” claim (a “general intangible”) and not a commercial tort claim (not covered by the security agreement). In addition, the court concluded that the secured party had a security interest in the claim against the contractor as “proceeds” of the cows because they represent damage to the cows.
- *In re Tower Air, Inc. Stanziale v. Finova Capital Corp.*, 2003 WL 21398007, 51 UCC Rep Serv 2d 219 (D. Del. 2003) – A secured party perfected its security interest in an aircraft with the proper filing with the FAA. When the aircraft was damaged, the security interest attached to the insurance payable as a result of the damage. Former UCC §§ 9-104, 9-306.
- *Agriliance, L.L.C. v. Runnells Grain Elevator, Inc.*, 272 F.Supp.2d 800, 51 UCC Rep Serv 2d 756 (S.D. Iowa 2003) – A debtor granted a security interest in its accounts. The debtor had account debtors issue checks in the name of creditors of the debtor. The creditors asserted that as holders in due course they took free of the secured party’s security interest in the checks as proceeds of the accounts. The creditors could satisfy the good faith element of HDC status. The circumstances did not give them notice that a secured party of the debtor had a security interest in the checks as proceeds of the secured party’s collateral. Good faith does not impose a general duty of inquiry. Thus the creditors could qualify as holders in due course of the checks. UCC § 3-302.
- *Metropolitan National Bank v. La Sher Oil Co.*, 101 S.W.3d 252, 51 UCC Rep Serv 2d 213 (Ark.App. 2003) – The court applied the “lowest intermediate balance rule” to determine whether proceeds deposited

into a deposit account and commingled with other funds were “identifiable.” Former UCC § 9-306.

F. *Default and Foreclosure*

1. *Default and Repossession of Collateral*

- *In re Moffett*, 288 B.R. 721, 48 UCC Rep. Serv. 2d 740 (Bankr. E.D. Va. 2002) – The debtor continues to own the collateral following the secured party’s repossession of the collateral.
- *In re Robinson*, 285 B.R. 732, 49 UCC Rep. Serv. 2d 327 (Bankr. W.D. Okla. 2002) – A secured party that has repossessed collateral, but not yet foreclosed on the collateral, does not yet own the collateral and the collateral remains part of the debtor’s bankruptcy estate.
- *Motors Acceptance Corporation v. Rozier*, 290 B.R. 910, 50 UCC Rep Serv 2d 313 (M.D.Ga. 2003) – A secured party’s repossession of collateral does not transfer title or ownership of the collateral to the secured party before the secured party conducts a foreclosure sale. Thus the collateral remains the property of the debtor and is a part of the debtor’s bankruptcy estate.
- *Automotive Finance Corp. v. Smart Auto Center, Inc.*, 2003 WL 21507868, 51 UCC Rep Serv 2d 297 (7th Cir. 2003) – Debtor did not tender full amount secured by collateral when it conditioned its tender on the sale of debtor’s business. Thus secured party had no obligation to release the collateral. UCC § 9-623.

2. *Retention of the Collateral in Satisfaction of the Debt*

- *In re Cadiz Properties, Inc.*, 278 B.R. 744 (Bankr. D. Texas 2002) – A secured party had a security interest in stock held in escrow. The escrow agreement provided that upon notice from the secured party the escrow agent would deliver the stock to the secured party. The debtor defaulted and the secured party gave the notice. The secured party argued that the terms of the escrow agreement provided that the transfer of the stock was an acceptance of the collateral in satisfaction of the debt under UCC § 9-620. The court correctly noted that under the revised Article 9 transition rules, revised Article 9

applied to the analysis. UCC § 9-702(a). UCC § 9-620 allows the secured party to activate that section only “after default” and that the secured party could not accomplish that result through the pre-default escrow agreement. Further, the court held that until a disposition of the collateral under UCC § 9-610, the debtor remained the owner of the collateral and only the debtor could vote the collateral.

Comment: The secured party could have obtained a proxy from the debtor to vote the stock prior to foreclosure. *See, e.g.*, Delaware GCL § 217(a), California Corporations Code § 705(e)(1).

3. *Notice and Commercial Reasonableness of Foreclosure Sale*

- *Vornado PS, LLC v. Primestone Investment Partners, LP*, 821 A2d 296, 49 UCC Rep.Serv. 2d 1348 (Del. Ch. 2002) – A secured party had a security interest in “private” securities. The debtor defaulted and the secured party wanted to be able to bid for the collateral at the foreclosure sale. A secured party cannot bid at a private foreclosure sale unless the collateral is “recognized market or the subject of widely distributed standard price quotations.” UCC § 9-610(c)(2). A secured party can always bid for the collateral at a public sale so the secured party decided to conduct a public foreclosure sale. The secured party retained a leading investment banking firm to seek potential buyers. It contacted over 50 potential purchasers. The secured party knew some confidential information about the issuer of the securities that the secured party did not disclose. The secured party told potential buyers that it had confidential information that it could not disclose. The debtor itself did not disclose that information. Ultimately the secured party purchased the collateral at a public sale. The court held that the conduct of the public foreclosure sale was commercially reasonable because the secured party was one of the most likely buyers and could buy only at a public sale.
- *Allco Enterprises, Inc. v. Goldstein Family Living Trust*, 51 P3d 1275, 48 UCC Rep. Serv. 2d 752 (Or. Ct. App. 2002) – A “lease” was either a true lease or a “security interest.” The court concluded that it did not matter because the obligation of the lessor/secured party to dis-

pose of the leased goods/collateral in a commercially reasonable manner was the same either way.

- *In re Atlantic Orient Corp.*, 290 B.R. 456, 49 UCC Rep. Serv. 2d 1138 (Bankr. D.N.H 2003) – A buyer at a foreclosure sale did not properly pay for collateral that the buyer had purchased at a foreclosure sale. The debtor filed for bankruptcy before the buyer made a proper payment. Under UCC § 2-328, title to goods sold at an auction passes when the hammer falls. The court noted that the seller and buyer can agree to different result and that that had occurred here. As a result, due to the improper payment, title did not pass to the buyer. Because a debtor continues to own the collateral following the secured party's repossession of the collateral until the secured party has foreclosed on the collateral, the court held that the collateral was still part of the debtor's bankruptcy estate.

Comment: The secured party generally takes the risk of the foreclosure buyer's payment when the secured party sells on credit. UCC § 9-615(c). Thus, although the transaction between the secured party and the foreclosure buyer may remain open, as between the debtor and the buyer it should be completed and title should no longer remain with the debtor.

- *Beardmore v. American Summit Financial Holdings, LLC*, 351 F.3d 352 (8th Cir. 2003) – A secured creditor and the debtor had agreed to follow certain procedures in connection with the sale of collateral. When the secured party did not follow those procedures, the court held that the secured party had not acted in a commercially reasonable manner and therefore was not entitled to a deficiency judgment.

Comment: The court applied pre-revised Article 9 law in reaching its conclusion, noting that the foreclosure sale had occurred prior to July 1, 2001. UCC § 9-702 provides that revised Article 9 applies to transactions entered into before the Act takes effect (the foreclosure sale at issue was apparently a nonjudicial foreclosure sale and therefore a transaction) and that it does not apply to "an action, case or proceeding commenced before this Act takes effect" (which the comments point out is a litigation-focused description).

- *Citizens National Bank v. Robertson*, 2003 WL 1484823, 50 UCC Rep Serv 2d 587 (Mo.App. 2003) – The poor condition of collateral alone did not demonstrate the commercial reasonableness of a foreclosure sale that brought a low price in the absence of evidence concerning the efforts to sell the goods.
- *Baird Credit Corp. v. Seher*, 2003 WL 1720029, 50 UCC Rep Serv 2d 591 (N.D.Ill. 2003) – A security agreement provided that the secured party did not have to foreclose on collateral, in the absence of a demand from the debtor to foreclose, accompanied by payment of any shortfall. The court held that this provision was enforceable. See UCC § 9-601(a)(1). The court also held that the secured party's exercise of discretion in this area was subject to the duty of good faith and that the trial court could examine whether the secured party had acted in good faith in not conducting a foreclosure sale. UCC § 1-203.

4. *Effect of Failure to Give Notice or to Conduct Commercially Reasonable Foreclosure Sale*

- *In re Downing*, 286 B.R. 900, 49 UCC Rep. Serv. 2d 983 (Bankr. W.D. Mo. 2002) – A notice to a debtor failed to include several items of information required by UCC §§ 9-613, 9-614. The court held that the secured party was not entitled to a deficiency judgment, citing a decision under former Article 9.

Comment: The court did not refer to UCC § 9-626, which provides for the recovery of a deficiency judgment in non-consumer transactions, even where the secured party fails to comply with Article 9. The courts are allowed to determine the rule in consumer transactions. UCC § 9-626(b).

G. *Transition*

- *In re Ball, Morris v. General Motors Acceptance Corp.*, 281 B.R. 706, 2002 WL 1827851, 48 UCC Rep Serv 2d 709 (Bankr. D.Kansas 2002) – The commencement of a bankruptcy proceeding prior to the effective date of revised Article 9 meant that the rights of a secured party against the trustee in bankruptcy would be determined under former Article 9. UCC § 9-702.

- *In re Stout*, 284 B.R. 511, 49 UCC Rep. Serv. 2d 626 (Bankr. D. Kan. 2002)
 - A security interest in crops under a security agreement entered into under former Article 9 was not effective because it did not contain a description of the real property on which the crops were growing, as required by former UCC § 9-203(1)(a). Revised Article 9 does not require the description of the real property. The court incorrectly held that UCC § 9-702's provision that revised Article 9 applies generally to pre-revised Article 9 transactions did not make the security interest enforceable.
- *Dean v. Hall*, 2003 WL 21650145, 50 UCC Rep Serv 2d 618 (E.D.Va. 2003)
 - A landlord's lien was an "agricultural lien" subject to Article 9 and the holder of the lien has to file a financing statement to perfect the lien. A landlord that held a lien that arose before the effective date of revised Article 9 had one year to file a financing statement to maintain the perfection. UCC § 9-703(b)(1). The holder of an agricultural lien that did not file a financing statement within the one-year period became unperfected at the end of the period.
- *In re S.M. Acquisition Co.*, 296 B.R. 452, 51 UCC Rep Serv 2d 867 (Bankr. N.D.Ill. 2003) – Revised Article 9 applies to transaction entered into before the effective date of revised Article 9. UCC § 9-702. The court held that the debtor had "rights in the collateral," consisting of molds owned by another person, because the true owner had given possession of the molds to the debtor. UCC § 9-203. Although the debtor warranted that it would keep the collateral at specific locations, the description of the collateral in the security agreement did not limit the collateral to molds at those locations.

II. REAL PROPERTY SECURED TRANSACTIONS

- *Ansley v. Ameriquest Mortgage Company*, 340 F.3d 858 (9th Cir. 2003) – Federal Alternative Mortgage Transaction Parity Act does not completely preempt California laws relating to alternative mortgage transactions.
- *Fischer v. First International Bank*, 109 Cal.App.4th 1433 (C.A. 2003) – Court refused to enforce fine-print dragnet clause in absence of mutual understanding that the clause meant what it says.
- *Pellandini v. Valadao*, 113 Cal.App.4th 1315 (C.A. 2003) – Under language of right of first refusal, a deed in lieu of foreclosure did not constitute a “bona fide offer for purchase” of the real property.
- *Dieden v. Schmidt*, 104 Cal.App.4th 645 (C.A. 1st 2002) – Judgment lien on tenancy in common interest survives the conversion of the interest to a joint tenancy and the death of the judgment debtor joint tenant. The result might have been different if the joint tenancy had existed at the time the judgment lien was created.
- *Nguyen v. Calhoun*, 105 Cal.App.4th 428 (C.A. 2003) – A debt secured by a deed of trust was not “paid” when a check for the debt was sent, but not received, before the foreclosure sale.

III. GUARANTIES

- *Rowan v. Riley*, 2003 WL 21403350, 50 UCC Rep Serv 2d 1127 (Id.Supr.Ct. 2003) – Accommodation party not liable to accommodated party and no subrogation rights exist against accommodation party in favor of primary obligor.
- *Rodehorst v. Gartner*, 2003 WL 22319213, 51 UCC Rep Serv 2d 604 (Neb. Supr.Ct. 2003) – A guaranty is not a negotiable instrument. UCC § 3-104.
- *Plein v. Lackey*, 67 P.3d 1061, 50 UCC Rep Serv 2d 234 (Supreme Court of Washington 2003) – A shareholder of a corporation signed a note as an accommodation maker. As such, when he paid the note, he was entitled to enforce the note and security for the note against the corporate co-maker. UCC § 3-419.

IV. FRAUDULENT TRANSFERS

- *Mejia v. Reed*, 31 Cal.4th 657 (Calif. Supreme Ct. 2003) – Transfer of real property under a marital settlement agreement may be found a “fraudulent transfer” under Uniform Fraudulent Transfer Act. The court considered whether the transfer amounted to constructive fraud because the transferor did not receive reasonably equivalent value in return and was insolvent at time of transfer or rendered insolvent by transfer. The discounted value of future child support was not considered as a liability since child support is generally paid from future income rather than current assets.
- *Lippe v. Bairnco Corporation*, 249 F.Supp.2d 357 (S.D.N.Y. 2003) – The court considered whether a company and its attorneys engaged in a series of intentional fraudulent transfers in order to shield the company assets from asbestos claims. The court examined whether (i) there was sufficient evidence that less-than-reasonably equivalent value had been received for the transferred assets, (ii) the company was solvent at the time of the transfer, and (iii) the parties intended to hinder, delay or defraud other creditors.
- *The Nostalgia Network, Inc. v. Lockwood*, 315 F3d 717 (7th Cir. 2002) – Gratuitous transfers amounted to constructive fraud under the Uniform Fraudulent Transfers Act. The fact that some or all of the transferred property may have later been transferred back to the debtor did not legitimize the original transfers.
- *First National Bank of Seminole v. Hooper*, 104 S.W.3d 83, 46 Tex. Sup Ct. J. 449 (Texas 2003) – The securing of an existing debt by property worth more than the amount of the debt was not a fraudulent transfer because the secured party’s interest in the collateral could not exceed the amount of the secured debt.

V. FINANCIAL INSTITUTIONS

- A. *Regulatory and Tort Claims – Good Faith, Fiduciary Duties, Interference With Prospective Economic Advantage, Libel, Invasion of Privacy*
- *Ostayan v. Nordhoff Townhomes Homeowners Association, Inc.*, 110 Cal.App.4th 120, 2003 SOS 3564 (Calif. 2003) – Where not required by provisions of covenants, conditions and restrictions, homeowners association has no fiduciary duty to notify unit owner of filing of bad faith lawsuit against association's insurer.
 - *Fragale v. Faulkner*, 110 Cal.App.4th 229, 2003 SOS 3606 (Calif. 2003) – Real estate broker who makes intentional misrepresentations to buyer breaches fiduciary duty and is liable for plaintiff's loss of benefit of bargain and not only for out-of-pocket losses.
 - *Lee v. Yang*, 111 Cal.App.4th 481, 2003 SOS 4567 (Calif. 2003) – The terms of joint bank account, not the rules of proportional ownership under the California Multiple-Party Accounts Law, determine the power of party to withdraw funds. Where a fiancée withdrew funds from a joint account in excess of her net contribution, but withdrawal was permitted by the terms of the account, and her fiancé failed to establish by a preponderance of evidence the existence of an independent legal obligation requiring the fiancée to account for the proceeds, the ownership of the withdrawn funds passed to her by way of gift. The fiancé was not entitled to recover the funds from the fiancée in an action for conversion, imposition of constructive trust, or money had and received.
 - *DVD Copy Control Association, Inc. v. Bunner*, 31 Cal.4th 864 (Cal.App.4th 2003) – Where a web site operator knew or had reason to know that confidential information had been acquired by improper means, an injunction issued under California trade secret law prohibiting the operator from disclosing the confidential information on the site. The trade secret law was content neutral speech regulation which served a significant governmental interest and was not prior restraint of free speech.

- *Superior Federal Bank v. Mackey*, No. CA02-1119, 2003 Ark. App. LEXIS 848 (Ark. Ct. App. Nov. 19, 2003) – A lender was liable for defamation when it made malicious and hateful statements to third parties that damaged the reputation of a company and its owner after the lender rejected the company's application for a loan.
- *Highland Capital, Inc. v. Franklin National Bank*, 350 F.3d 558 (6th Cir. 2003) – A borrower presented proof that a loan made to the borrower did not meet the lender's normal lending policies and provided an expert opinion that the loan should not have been made in the lender's ordinary course of business. The borrower was unable to establish the existence of a tying arrangement because the purchase of the lender's holding company's stock was not a condition for the loan.
- *In re Exide Technologies, Inc.*, 299 B.R. 732 (Bankr. D.Del. 2003) – A creditors' committee sought to recharacterize debt as "equity." Although that claim was rejected, a claim for equitable subordination was stated based on: (i) the banks' receipt of transactional fees from an ill-fated acquisition by the debtor, (ii) the banks taking of substantial new collateral as the debtor slid deeper into insolvency, and (iii) delaying the bankruptcy filing to mitigate avoidance action risks claim. A "savings clause" provision in the debtor's subsidiaries upstream guarantees were also insufficient to protect, as a matter of law, the guaranty transactions from fraudulent transfer challenges.
- *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (U.S. Sup.Ct. 2003) – Victoria's Secret could not enjoin a store from using the name "Victor's Little Secret" in the absence of showing "actual dilution" of the "Victoria's Secret" mark or trade name.
- *Korea Supply Company v. Lockheed Martin Corporation*, 29 Cal. 4th 1134 (Calif. Supreme Ct. 2003) – Claim for interference with prospective economic advantage does not require specific intent to interfere with a prospective economic advantage. It is sufficient that there be a "substantial certainty" that the interference will occur and that the action be "independently wrongful" with regard to the third party.
- *Streetscenes v. ITC Entertainment Group, Inc.*, 103 Cal.App.4th 233 (C.A. 2002) – Independent contractor that had all the "trappings" of being an

executive producer for a movie production company can create liability for the company as its “agent.”

- *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 02 C.D.O.S. 10640 (9th Cir. 2002) – Federal law preempts municipal ordinance prohibiting banks from charging ATM fees to non-depositors.
- *Ileto v. Glock Inc.*, 349 F.3d 1191, 03 C.D.O.S. 9984 (9th Cir. 2003) – Manufacturer of gun could be liable for nuisance for use of gun in the circumstances.
- *Intel Corporation v. Hamidi*, 30 Cal. 4th 1342 (Calif. Supreme Ct. 2003) – Former employee sending mass e-mails to employees of former employer does not commit trespass to chattels where e-mails do not damage the recipient’s computer system or impair its functioning.
- *Winter v. DC Comics*, 30 Cal. 4th 881 (Calif. Supreme Ct. 2003) – Comic book characters that evoke actual persons do not interfere with the actual persons’ right of publicity where the comic book characters include significant creative elements.
- *Roque De La Fuente II v. Federal Deposit Insurance Corporation*, 332 F.3d 1208, (9th Cir. 2003) – Federal Reserve rules limiting loans to insiders apply to person that has less than 10% ownership of bank, but has ability to control 25% of voting of shares of bank.

B. *Lender’s and Borrower’s Obligations Under Securities and Corporate Laws*

- *McKesson HBOC, Inc. v. N.Y. State Common Retirement Fund, Inc.*, 339 F.3d 1087 (9th Cir. 2003) – The court denied a surviving corporation’s claim for unjust enrichment against shareholders who benefited from alleged pre-merger fraud by the acquired entity because (i) a remedy at law was available against other parties, and (ii) it would result in an inappropriate piercing of the corporate veil.
- *Kennedy v. Venrock Associates*, 348 F.3d 584 (7th Cir. 2003) – The nature of claim as “derivative” or not is governed by the law of the state of incorporation of the entity. A suit framed as a minority shareholder suit will be an asset of the bankrupt corporation if it alleges that the value of the corporation was diminished and will be a direct claim of the share-

holder if it alleges that majority shareholders acted to misappropriate the value of minority shares for the benefit of majority shares. A claim by shareholders against directors alleging that the directors issued a misleading proxy statement that allowed the corporation to be reincorporated in Delaware (which decreased the protection afforded to shareholders) was a direct claim rather than a derivative claim. The effect of the reincorporation was to reduce the shareholders' power over the corporation's affairs rather than to reduce the value of the corporation.

- *In re Oracle Corp.*, 824 A.2d 917 (Del.Ch. 2003) – Special litigation committee of a corporation was not sufficiently independent where members had business and social ties to persons subject to claims.
- *Omnicare, Inc. v. NCS Healthcare, Inc. et al.*, 818 A.2d 914, 2003 WL 1787943 (Del. 2003) – Buyer of Delaware company could not force shareholder vote on its agreement by use of Delaware General Corporation Law § 251 and voting agreement.
- *Small v. Fritz Cos.*, 30 Cal. 4th 167 (Calif. Supreme Ct. 2003) – Shareholder that did not sell stock can bring misrepresentation action if it can show that misrepresentation caused it *not* to sell stock.
- *Securities and Exchange Commission v. Hickey*, 322 F.3d 1123 (9th Cir. 2003) – Court has inherent equitable power to freeze assets of person controlled by a person subject to SEC enforcement action.
- *Securities and Exchange Commission v. Wallenbrock and Associates*, 313 F.3d 532 (9th Cir. 2002) – Applying the “family resemblance” test of *Reves*, notes secured by accounts were “securities” because they were used to raise money, offered to the public, and would be viewed by investors as “investments.”

VI. UCC - SALES AND PERSONAL PROPERTY LEASING

A. Scope

1. General

- *Ask Technologies, Inc. v. Cablescope, Inc.*, 2003 WL 22400201, 51 UCC Rep Serv 2d 1028 (S.D.N.Y. 2003) – Contract was “predominantly” for the sale of goods where 80% of the value was attributable to goods and the balance to the installation of the goods. UCC § 2-102.
- *Farm Bureau Mutual v. Combustion Research Corp.*, 2003 WL 1249314, 50 UCC Rep Serv 2d 67 (Mich.App. 2003) – Manufacturer’s efforts to repair a product purchased 22 months earlier not a “sale” of the goods arising from the original contract because the manufacturer was not obliged to perform the repairs under the original contract.
- *Philippine American Life Insurance v. Raytheon Aircraft Co.*, 2003 WL 1581523, 50 UCC Rep Serv 2d 399 (D.Ks. 2003) – A “mandatory service bulletin” concerning the repair of a part of a good previously sold was not itself a “good” and no implied warranties arose out of the delivery of the bulletin.
- *Top Rank, Inc. v. Gutierrez*, 236 F.Supp.2d 637 50 UCC Rep Serv 2d 76 (W.D. Texas 2001) – Cable programming not sale of “goods” and UCC Article 2 warranty provisions do not apply.
- *Hutcherson v. Sears Roebuck & Co.*, 342 Ill.App.3d 109, 276 Ill.Dec. 127, 793 N.E.2d 886, 51 UCC Rep Serv 2d 653 (Ill.App. 2003) – Article 2 and UCC § 2-207 did not apply to a credit card agreement.
- *Brandt v. Boston Scientific Corp.*, 2003 WL 21290916, 50 UCC Rep Serv 2d 701 (Ill. Sup.Ct. 2003) – A hospital’s provision of a defective medical device in the course of providing medical services was incidental to the services and the “predominant” purpose of the transaction was the sale of services. Thus Article 2 implied warranties did not arise in connection with the transfer of the defective device.

- *Sick, Inc. v. Motion Control Corp.*, 2003 WL 21448864, 50 UCC Rep Serv 2d 1021 (D.Minn. 2003) – Distribution agreement was “primarily” for the sale of goods and the “economic loss” doctrine prevented the buyer from obtaining non-contractual remedies. UCC § 2-102.

2. *Software and Other Intangibles*

- *Pearl Investments, LLC v. Standard I/O, Inc; Chunn v. Daudelin*, 2003 WL 1741211, 50 UCC Rep Serv 2d 377 (D.Maine 2003) – The development of new software from scratch was not a sale of a “good,” rather it was a services agreement and no implied warranties arose under the services agreement.
- *Sagent Technology, Inc. v. Micros Systems, Inc.*, 2003 WL 21939365, 51 UCC Rep Serv 2d 59 (D. Md. 2003) – The sale of software on a CD is a sale of “goods” covered by UCC Article 2.
- *Olcutt Intern. & Co., Inc. v. Micro Data Base Systems, Inc.*, 793 N.E.2d 1063, 51 UCC Rep Serv 2d 352 (Ind.App. 2003) – Although Article 2 does not apply to a contract to develop software, Article 2 does apply to the sale of off-the-shelf software. Thus UCC Article 2’s statute of limitations applies to a claim based on the purchase of off-the-shelf software.

B. *Contract Formation and Modification; Statute of Frauds; “Battle of the Forms”; Contract Interpretation; Title Issues*

1. *General*

- *Imex Intl. Inc. v. Wires Engineering Imex Intl., Inc. v. Co. Fi. Plast.*, 2003 WL 2013073, 50 UCC Rep Serv 2d 448 (Ga.App. 2003) – An invoice that accompanied goods constituted the written confirmation that satisfied the statute of frauds when the buyer did not object within 10 days. UCC § 2-201(1).
- *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 2003 WL 21513366, 51 UCC Rep Serv 2d 364 (Ill.App. 2003) – A party to an agreement could “sign” an addendum to the agreement by signing the agreement itself.

2. Battle of the Forms

- *Zenith Electronics Corp. v. WH-TV Broadcasting Corp.*, 2003 WL 1627458, 50 UCC Rep Serv 2d 94 (N.D. Illinois 2003) – A limitation of liability term did not materially alter the term of agreement given by seller so it became part of the agreement. UCC § 2-207.
- *Standard Bent Glass Corp. v. Glassrobots Oy*, 2003 WL 21419202, 50 UCC Rep Serv 2d 1036 (3rd Cir. 2003) – A buyer's failure to object to arbitration term allowed the term to become part of the agreement. UCC § 2-207.
- *Flender Corp. v. Tippins International, Inc.*, 2003 WL 21957985, 51 UCC Rep Serv 2d 68 (Pa. Supr.Ct. 2003) – “Different” terms in an acceptance “knock out” both the original terms and the different terms. UCC § 2-207.

C. Warranties and Products Liability

1. Warranties

- *Cryolife, Inc. v. Superior Court (Minvielle)*, 110 Cal.App.4th 1145, 2003 SOS 3961 (C.A. 2003) – Health and Safety Code Sec. 1635.2, specifying that collection, processing, storage, or distribution of tissue for purpose of transplantation is a service, bars action based on theory of strict product liability against tissue bank supplying cadaver parts for use in surgical procedures.
- *Bobb Forest Products, Inc. v. Morback Industries, Inc.*, 151 Ohio App.3d 63, 50 UCC Rep Serv 2d 106 (Ohio App. 2002) – Although “puffing” is not an express warranty, statements made by a remote seller can be express warranties where the statements go beyond puffing.
- *Tex Enterprises, Inc. v. Brockway Standard, Inc.*, 2003 WL 1884168, 50 UCC Rep Serv 2d 317 (Supreme Court of Washington 2003) – Although a buyer of goods had discussed the quality of goods with the manufacturer, no implied warranty from the manufacturer arose in favor of the buyer when the buyer purchased the goods from a third party. Implied warranties do not arise in the absence of privity.

- *Rampey v. Novartis Consumer Health, Inc.*, 2003 WL 21246560, 51 UCC Rep Serv 2d 117 (Alabama Supr.Ct. 2003) – Implied warranties to not run to a person not in privity with the seller.
- *Williams v. The Dow Chemical Co.*, 2003 WL 1793026, 50 UCC Rep Serv 2d 403 (S.D.N.Y. 2003) – A buyer that did not know of an express warranty could not bring a claim based on the express warranty because it could not have been part of the basis of the bargain. UCC § 2-313.
- *Controlled Environments Construction, Inc. v. Key Industrial Refrigeration Co.*, 2003 WL 22461949, 51 UCC Rep Serv 2d 1079 (Neb. Supr.Ct. 2003) – A warranty as to future performance must be express and cannot arise from an implied warranty. A promise to repair or replace defective goods does not cause a warranty to extend to future performance. UCC § 2-725.
- *Haight v. Dales Used Cars, Inc.*, 2003 WL 22416394, 51 UCC Rep Serv 2d 1017 (Idaho App. 2003) – The implied warranty of merchantability may be disclaimed without mentioning “merchantability” if there is a conspicuous “AS IS” disclaimer. UCC § 2-316.
- *Mitchell v. BBB Services Co., Inc.*, 261 Ga.App. 240, 582 S.E.2d 470, 51 UCC Rep Serv 2d 393 (Ga.App. 2003) – A hamburger that contained a bone was “defective” based on the reasonable expectations of the consumer, even where the bone was “natural” to the food.
- *Keller v. Inland Metals All Weather Conditioning, Inc.*, 2003 WL 22024243, 51 UCC Rep Serv 2d 303 (Idaho Supr.Ct. 2003) – Where goods were not themselves defective, but failed to meet the particular needs of the buyer, the buyer’s direct damages were zero because the value of the goods was equal to its market value. UCC § 2-713.
- *Salter v. Al-Hallaq*, 2003 WL 1872991, 50 UCC Rep Serv 2d 348 (D.Ks 2003) – Buyer may not recover punitive damages for breach of warranty *per se*.
- *IMI Norgren Inc. v. D&D Tooling & Manufacturing, Inc.*, 2003 WL 21501783, 51 UCC Rep Serv 2d 347 (N.D. Illinois 2003) – No implied

warranties arose under a service contract where an owner of goods supplied them to another company that provided services concerning the goods.

- *Chere Amie, Inc. v. Windstar Apparel Corp.*, 2003 WL 22056935, 51 UCC Rep Serv 2d 969 (S.D.N.Y. 2003) – The warranty against infringement applies to copyright and trademark claims. UCC § 2-312.

2. Limitation of Liability

- *BOC Group, Inc. v. Chevron Chemical Company, LLC*, 359 N.J.Super. 135, 819 A.2d 431, 50 UCC Rep Serv 2d 489 (N.J.Super. 2003) – A sales contract provided for an “exclusive remedy” of the difference in price between the sales price of the goods and the cost of buying them from another seller. The exclusive remedy did not “fail of its essential purpose” when the buyer failed to try to make the alternative purchases.
- *Patapsco Designs, Inc. v. Dominion Wireless, Inc.*, 2003 WL 21939370, 51 UCC Rep Serv 2d 159 (D. Md. 2003) – Although an exclusive remedy failed of its “essential purpose,” a limitation on consequential damages remained enforceable. UCC § 2-719.

3. “Economic Loss” Doctrine

- *Holden Farms, Inc. v. Hog Slat, Inc.*, 2003 WL 22433336, 51 UCC Rep Serv 2d 986 (8th Cir. 2003) – The economic loss doctrine precludes all tort claims arising out of defects in goods sold, unless the defect causes damage to “other property.”
- *Higginbotham v. Dryvit Systems, Inc.*, 2003 WL 1528483, 50 UCC Rep Serv 2d 128 (M.D. NC 2003) – Defective stucco applied to a house became a part of the house so that there was no damage to “other property” and the economic loss rule prevented the buyer from bringing a tort claim for economic loss.
- *Grynberg v. Questar Pipeline Co.*, 2003 UT 8, 50 UCC Rep Serv 2d 171 (Utah Supreme Court 2003) – The economic loss rule does not apply where an independent tort duty exists. However, where the tort

and contract claims are based on the same set of facts, the rule does apply to preclude a tort claim.

- *Air Products and Chemicals, Inc. v. Eaton Metal Products Co.*, 2003 WL 1825069, 50 UCC Rep Serv 2d 419 (E.D.Pa. 2003) – The economic loss rule does not bar claims based on intentional fraud or misrepresentation and thus did not bar a claim based on fraud in the inducement.
- *Superior Kitchen Designs, Inc. v. Valspar Industries (U.S.A.), Inc.*, 2003 WL 21002898, 50 UCC Rep Serv 2d 748 (D. Mass. 2003) – The economic loss doctrine prevented recovery for damage to cabinets from sealer because cabinets were not “other property.”
- *HDM Flugservice GMBH v. Parker Hannifin Corp.*, 2003 WL 21402388, 50 UCC Rep Serv 2d 1053 (6th Cir. 2003) – The economic loss doctrine prevented buyer from claiming strict liability in tort. Damage to landing gear of a helicopter by components was not damage to “other property” that would take the damage out of the economic loss doctrine.
- *Tibco Software, Inc. v. Gordon Food Service, Inc.*, 2003 WL 21683850, 51 UCC Rep Serv 2d 102 (W.D. Mich. 2003) – Fraud claims interwoven with contract claims are barred by economic loss doctrine.

D. *Performance, Breach and Damages*

- *Marlow v. Conley*, 787 N.E.2d 490, 50 UCC Rep Serv 2d 712 (Ind.App. 2003) – A buyer that obtained goods through fraud obtained voidable title and could transfer good title to a good faith purchaser. UCC § 2-403.
- *IMI Norgren Inc. v. D & D Tooling & Manufacturing, Inc.*, 247 F.Supp.2d 966, 50 UCC Rep Serv 2d 1072 (N.D. Ill. 2002) – Damages arising from cost of repairing defective goods not limited to amount of purchase price. UCC § 2-714.
- *In re Nedwick Steel Company, Inc.*, 289 B.R. 95, 50 UCC Rep Serv 2d 736 (Bankr. N.D. Ill. 2003) – UCC § 2-210 did not permit the assignment of rights under a distribution agreement to a competitor of the other party

to the agreement where there existed a risk of nonperformance by the competitor who would not have an interest in performing under the agreement.

- *Business Communications, Inc. v. KI Networks, Inc.*, 2003 WL 21146640, 50 UCC Rep Serv 2d 799 (No.Car.App. 2003) – The court enforced contractual provision providing that buyer has three weeks after installation of goods to reject them.
- *Coburn Supply Company, Inc. v. Kohler Co.*, 2003 WL 21802016, 51 UCC Rep Serv 2d 80 (5th Cir. 2003) – A 105-day notice of termination of a contract is “reasonable” time to allow for replacement source of supply. UCC § 2-309(3).
- *Hess Energy, Inc. v. Lightning Oil Co., Ltd.*, 2003 WL 21757273, 51 UCC Rep Serv 2d 1 (4th Cir. 2003) – A buyer’s damages were measured based on the date that the seller was supposed to perform, not the date that the seller told the buyer of the seller’s repudiation of agreement.
- *Poindexter v. Morse Chevrolet, Inc.*, 2003 WL 21638231, 51 UCC Rep Serv 2d 37 (D. Ks. 2003) – The UCC allows for punitive damages based on fraud, but the damages must be based on the fraud and not breach of warranty. UCC § 1-103.

E. *Personal Property Leasing*

- *In re Montgomery Ward Holding Corp.*, 326 F3d 383 (3d Cir. 2003) – The casualty values specified in computer equipment leases constituted uncollectible punitive damages.
- *Wells Fargo Bank Northwest, N.A. v. Taca International Airlines, S.A.*, 2003 WL 21180415, 50 UCC Rep Serv 2d 811 (S.D.N.Y. 2003) – Liquidated damages clause was enforceable and did not also permit recovery of actual damages where the clause said that it applied to the extent permitted by law. Had the agreement sought to permit both liquidated damages and actual damages, it would have put the lessor in a better position that it was entitled to had the lessee performed under the lease. UCC § 2A-523, Comment 4.

- *In re Montgomery Ward & Co., Inc. Holding Corp.*, 2003 WL 1870898, 50 UCC Rep Serv 2d 202 (3rd Cir. 2003) – A lease that contained a requirement for the payment of “casualty values” in the event of the lessee’s default put the lessor in a better position than it would have been had the lessee performed. As such, the clause was an unenforceable “penalty” and not valid liquidated damages.
- *Eplus Group, Inc. v. Panoramic Communications LLC*, 2003 WL 1572000, 50 UCC Rep Serv 2d 213 (S.D.N.Y. 2003) – A lease that contained a “casualty” value clause that provided for a payment of three times the amount of rent due under the lease was a “penalty” and not valid liquidated damages.
- *Mercedes-Benz Credit Corp. v. Johnson*, 1 Cal.Rptr.3d 396, 51 UCC Rep Serv 2d 168 (Cal.App. 2d 2003) – The delivery of leased goods to a lessee is not “entrustment” of the goods that would enable the lessee to transfer good title. UCC §§ 2-403, 2A-305.
- *Information Leasing Corp. v. GDR Investments, Inc.*, 152 Ohio App.3d 260, 787 N.E.2d 652, 51 UCC Rep Serv 2d 174 (Ohio App. 2003) – A “hell or high water” clause is not inherently unconscionable. UCC § 2A-407.
- *Greatamerica Leasing Corp. v. Star Photo Lab, Inc.*, 2003 WL 22438622, 51 UCC Rep Serv 2d 1133 (Iowa App. 2003) – “Hell or high water” provision was enforceable. UCC § 2A-407.
- *Bescos v. Bank of America*, 105 Cal.App.4th 373 (C.A. 2003) – A lender that financed leases entered into by another person did not have liability as “lessor” for misrepresentations made by the actual lessor where the lender did not know of the misrepresentations and the misrepresentations were not apparent on the face of the lease.

VII. COMMERCIAL PAPER, ELECTRONIC FUNDS AND TRANSFERS

A. *Negotiable Instruments and Holder in Due Course*

- *The Provident Bank v. Morequity, Inc.*, 2003 WL 21361357, 50 UCC Rep Serv 2d 1205 (Ga.App. 2003) – Although the purchaser of a note did not have notice of a claim to the instrument when it agreed to purchase, the note, by the time the purchaser got possession of the note, the purchaser had notice of a claim to the note in favor of a secured party of the transferor. Thus the purchaser could not qualify as a holder in due course.

B. *Payment of Notes, Checks and Other Instruments*

- *Messing v. Bank of America, N.A.*, 2003 WL 1793353, 50 UCC Rep Serv 2d 1 (Md.App. 2003) – Unless a drawee bank has accepted a check, the bank has no obligation to pay the check. UCC § 3-413.
- *Singleton v. American Security Bank of Ville Platte, Inc.*, 849 So.2d 72, 51 UCC Rep Serv 2d 789 (La.App. 2003) – A corporation had a checking account at a bank. A shareholder of the corporation was not a “customer of the bank that could bring an action in the shareholder’s own right for wrongful dishonor. UCC § 4-402.
- *Barak v. Obioha*, 2003 WL 21938623, 51 UCC Rep Serv 2d 468 (3rd Cir. 2003) – A partnership opened an account at a bank. A partner in the partnership was not a “customer” of the bank for purposes of bringing a claim against the bank. UCC § 4-104.
- *State Street Bank and Trust Co. v. Lord*, 2003 WL 21697417, 51 UCC Rep Serv 2d 191 (D. Fla. 2003) – Under *Joslin* decision, a person not in possession of a note cannot enforce it, except in limited circumstances (unless the recent revisions to Article 3 have been adopted). UCC § 3-309.
- *Marshall v. First Bank & Trust*, 2003 WL 21246496, 50 UCC Rep Serv 2d 860 (La.App.4th 2003) – An estranged spouse deposited into a joint ac-

count with her spouse a check payable to her spouse. The depository bank supplied the other spouse's indorsement and acted properly with regard to the check.

- *Schmitz v. Firststar Bank Milwaukee*, 2003 WL 21499932, 50 UCC Rep Serv 2d 1143 (Wisc.Supr.Ct. 2003) – Although a bank can supply a missing indorsement of a payee when a check is being deposited to the account of the payee, the bank does not act in a commercially reasonable manner when it accepts a check missing the payee's indorsement for deposit into the account of another person. UCC § 4-205.
- *John Hancock Financial Services, Inc. v. Old Kent Bank*, 2003 WL 22317379, 51 UCC Rep Serv 2d 595 (6th Cir. 2003) – The indorsement of a check by an authorized person is not a forged indorsement, even when the authorized person then absconds with the funds. UCC § 3-406.
- *American State Bank v. Union Planters Bank, N.A.*, 2003 WL 21361043, 50 UCC Rep Serv 2d 1157 (8th Cir. 2003) – Liability for conversion of instrument may be reduced where proceeds of check found their way to intended recipient.
- *Grant v. Marshall*, 2003 WL 21683449, 51 UCC Rep Serv 2d 749 (N.Y. Supr.Ct. 2003) – The oral cancellation of note was not effective. UCC § 3-605.

C. *Payment-in-Full Checks*

- *Hunter-McDonald, Inc. v. Edison Foard, Inc.*, 2003 WL 21003704, 50 UCC Rep Serv 2d 326 (No.Car.App. 2003) – For a “payment-in-full” check to operate as an accord and satisfaction, there must be an “unliquidated” claim or a *bona fide* dispute as to the amount owed by the drawer of the check *before* the check is tendered. It is not sufficient if the dispute arises afterwards.
- *Morgan v. Crawford*, 2003 WL 21106260, 50 UCC Rep Serv 2d 373 (Ky.App. 2003) – A payee of a “payment-in-full” check did not avoid an accord and satisfaction by indorsing the check “under protest.”
- *Alpine Haven Property Owners Ass’n, Inc. v. Deptula*, 2003 WL 21361375, 51 UCC Rep Serv 2d 195 (Vermont Supr.Ct. 2003) – A “*bona fide*” dis-

pute as to an amount owed did not exist for purposes of the UCC's payment-in-full check rules where the obligor had previously litigated and lost its claim that it did not owe money.

- *In re Hylton v. Meztista*, 845 So. 2d 795, 51 UCC Rep Serv 2d 461 (Ala. Supr.Ct. 2003) – A payment-in-full check was effective to create an accord and satisfaction where the payee attempted to reserve her rights when indorsing the check. The obligor satisfied the “*bona fide*” dispute test even though there was a question of good faith in the underlying transaction. The court held that the question of good faith applied only to the tender of the check itself. UCC § 3-311.

D. *Electronic Funds Transfer*

- *Estate of Freitag ex rel. Blackburn v. Frontier Bank*, 2003 WL 22039140, 51 UCC Rep Serv 2d 470 (Wash.App. 2003) – A funds transfer was “authorized” when given by a fiduciary, even though the fiduciary was acting improperly, because the fiduciary had actual or apparent authority to authorize the transfer. UCC § 4A-202.
- *Regions Bank v. The Provident Bank, Inc.*, 2003 WL 22158774, 51 UCC Rep Serv 2d 579 (11th Cir. 2003) – UCC Article 4A incorporated into Federal law through Regulation J.

E. *Usury*

- *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003) – The National Bank Act preempts state law and the National Bank Act is the exclusive remedy for usury actions against national banks. The court emphasized the special nature of national banks and the need to have a regulatory scheme that protects them from state interference.

Comment: The National Bank Act looks to the state usury law of the state in which the bank is located to determine the appropriate interest rate.

- *Jones v. Wells Fargo Bank*, 112 Cal.App.4th 1527, 2003 WL 22463968 (C.A. 2003) – Under National Bank Act § 85 and California Financial Code § 1504, a national bank did not make a usurious loan by making a shared

appreciation mortgage. The loan was not unconscionable for providing for a shared appreciation mortgage.

VIII. LETTERS OF CREDIT, INVESTMENT SECURITIES, AND DOCUMENTS OF TITLE

A. *Letters of Credit*

- *Amwest Surety Insurance Co. v Concord Bank*, 2003 WL 553965, 50 UCC Rep Serv 2d 249 (E.D.Mo 2003) – The issuer of letter of credit was liable to the beneficiary when dishonor was not based on fraud in the documents or material fraud in the underlying transaction. Thus the independence principle required the issuer to honor the letter of credit. UCC § 5-109.
- *Montgomery Ward, LLC v. Wiseknit Factory, Ltd.*, 2003 WL 1894742, 50 UCC Rep Serv 2d 563 (Bankr. D.Del. 2003) – A seller that shipped goods and had a right to draw on a letter of credit had a prepetition claim when the goods were shipped before the buyer went into bankruptcy, even though the buyer's receipt of the goods and the draw under the letter of credit took place after bankruptcy.

B. *Investment Securities*

- *Decker v. Yorkton Securities, Inc.*, 106 Cal.App.4th 1315, 50 UCC Rep Serv 2d 271 (Cal.App. 2003) – Whether a securities intermediary has “notice” of an adverse claim under UCC §§ 8-105 and 8-115 is based on a subjective analysis. Thus the intermediary must have actual knowledge of facts that make the intermediary “aware of a significant probability that an adverse claim exists.”
- *Wortley v. Camplin*, 2003 WL 21448802, 50 UCC Rep Serv 2d 1178 (1st Cir. 2003) – A waiver of warranty rights under Article 8 is effective even if other party acting in bad faith, if the bad faith itself does not cause the waiver.
- *S.E.C. v. Credit Bancorp, Ltd.*, 279 F.Supp.2d 247, 2003 WL 22004831, 51 UCC Rep Serv 2d 492 (S.D.N.Y. 2003) – Notice of a third party's ownership claim to a security is not notice of an “adverse claim” for purposes of UCC Article 8, unless the person claiming protected purchaser status

also had notice that the transfer violates the other party's ownership interest. UCC § 8-105.

C. *Documents of Title*

- *Kesel v. United Parcel Service, Inc.*, 339 F.3d 849 (9th Cir. 2003) – A shipper allowed a sending party to insure goods at a higher-than-minimum value, but expressly limited the insured valuation to an amount determined by a local customs official. When an agent for the sending party agreed to ship under the circumstances, and the shipper complied with the released-valuation doctrine, the shipper was not liable for value of goods in excess of accepted limit.
- *Gyamfoah v. EG & G Dynatrend*, 2003 WL 22208725, 51 UCC Rep Serv 2d 805 (E.D. Pa. 2003) – A warehouse had the burden of proof to prove that it was not negligent in losing goods that it had received for storage.
- *Jasphy v. Osinsky*, 2003 WL 22490472, 51 UCC Rep Serv 2d 1215 (New Jersey App. 2003) – A provision in warehouse contract that if no value was stated, the stored goods would be valued at \$1 was unconscionable where there was no convenient method of showing a higher value. UCC § 7-204.
- *Olsen v. Santa Barbara's Gracious Living, Inc.*, 103 Cal.App.4th 1377, 02 C.D.O.S. 11643 (C.A. 2002) – Carrier may enforce lien on good carried, even though another person owned the goods. The owner of the goods had given possession of the goods to the person shipping the goods and the carrier did not have notice of any lack of authority to incur the shipping charges. UCC § 7-307.
- *King Jewelry, Inc. v. Federal Express Corp.*, 316 F.3d 961 (9th Cir. 2003) – Liability for damage incurred during shipment of candelabra was limited to amount set in shipping contract for “items of extraordinary value.”

IX. CONTRACTS

A. *Formation, Scope, and Meaning of Agreement*

- *Pacific State Bank v. Greene*, 110 Cal.App.4th 375, 2003 SOS 3625 (Calif. Ct.App. 2003) – The parol evidence rule does not bar a party from offering evidence that its signature on an agreement was procured by a misrepresentation of fact concerning the content of the physical document to be signed.
- *Grimes v. New Century Mortgage Corporation*, 340 F.3d 1007 (9th Cir. 2003) – An agent of a party to a contract represented to the other party that the terms stated in the contract signed by the other party were erroneous and would be corrected. The complaining party was entitled to assert the changes.
- *AIH Acquisition Corp. LLC v. Alaska Industrial Hardware, Inc.*, 2003 U.S. Dist. LEXIS 11258 (S.D.N.Y. 2003) – Parties that had negotiated a stock purchase agreement could be forced to sign it based on “final” oral agreement and full negotiation of terms of agreement.
- *Founding Members of The Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 109 Cal.App.4th 944, 135 CR2d 505 (C.A. 2003) – “Right of First Offer” in governing regulations of country club extended only to “organization” existing as of date of agreement to sell, and neither plaintiff unincorporated association of members, nor any other qualified member organization, existed on that date.
- *Intel Corporation v. VIA Technologies, Inc.*, 319 F.3d 1357, 2003 U.S. App. LEXIS 2730 (N.D. Cal. 2003) – Ambiguity in license agreement interpreted against licensor that had been the sole drafter of the agreement.
- *Gunther-Wahl Productions, Inc. v. Mattel, Inc.*, 104 Cal.App.4th 27, 02 C.D.O.S. 11783 (C.A. 2nd 2002) – Solicited disclosure of idea to toy company compensable even if not novel and in the absence of express agreement to pay for the concept if used. An implied contract could be formed based on the circumstances.

- *IB Melchior v. New Line Productions, Inc.*, 106 Cal.App.4th 224 (C.A. 2003) – Acceptance of benefits under an assigned contract may also involve undertaking the burdens of the contract. California Civil Code §§ 1589, 3521.

B. *Releases, Exculpation and Indemnity Clauses*

- *Gavin W. v. YMCA of Metropolitan Los Angeles*, 106 Cal.App.4th 662 (C.A. 2003) – Use of child care is “affected with a public interest” and an agreement releasing a child-care provider from liability for its own negligence is not enforceable.
- *Health Net of California, Inc. v Department of Health Services*, 113 Cal.App.4th 224 (C.A. 2003) – Parties to a contract cannot agree to release a party from future violations of statutory or regulatory law. California Civil Code § 1668.
- *Benedek v. PLC Santa Monica, LLC*, 104 Cal.App.4th 1351, 129 CR2d 197 (C.A. 2002) – Health club member’s signed broad waiver of liability, whether using exercise equipment or not, barred member’s personal injury suit unrelated to use of exercise equipment.

C. *Adhesion Contracts, Unconscionable Agreements, and Other Public Policy Limits, Interference with Contract*

- *Deminsky v. Arlington Plastics Machinery*, 657 N.W.2d 411, 50 UCC Rep Serv 2d 53 (Wisconsin Supreme Court 2003) – There was no procedural unconscionability in an indemnity provision that appeared on the back of a single-sheet contract where the word “AGREED” appeared on the front, about the buyer’s signature, the front directed the reader to read the T’s + C’s on the back of the agreement, and the particular clause had an informative, conspicuous heading.
- *Wolf v. Walt Disney Pictures and Television*, 106 Cal.App.4th 625 (Calif. 2003) – Agreement that provided that one party would receive contingent compensation based on the other party’s efforts did not create a fiduciary relationship in favor of the first party.

D. *Jurisdiction, Choice of Law and Choice of Forum*

- *Chateau Des Charmes Wines Ltd. v. Sabate USA Inc., Sabate S.A.*, 328 F.3d 528 (9th Cir. 2003) – Under CISG, forum selection clauses in invoices did not become part of agreement.
- *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072 (9th Cir. 2003) – Court has general personal jurisdiction over a mail-order company that has substantial mail-order and internet business in California.
- *Net2Phone, Inc. v. Superior Court*, 109 Cal.App.4th 583, 135 CR2d 149 (C.A. 2003) – Private plaintiff, which itself suffered no injury, was bound by forum-selection clause in Internet telecommunications company's user agreement when it filed representative action under Unfair Competition Law because customers would be bound if they sued.

E. *Arbitration*

- *Jaramillo v. JH Real Estate Partners, Inc.*, 111 Cal.App.4th 394, 2003 SOS 4500 (Calif. Ct.App. 2003) – A small print arbitration clause in a residential lease made personal injury claims arising from the condition of leased premises subject to arbitration and that must be demanded in writing within 180 days after the claim arose. The clause also required that all administrative fees and costs had to be advanced prior to arbitration, and there was no opportunity in the printed form lease for tenants to decline the provision. The clause lacked bilaterality and was unconscionable.
- *McManus v. CIBC World Markets Corp.*, 109 Cal.App.4th 76 (C.A. 2003) – Standard securities industry arbitration agreement enforceable. Provision requiring employee to advance substantial costs is not, but is severable.
- *Gutierrez v. Autowest, Inc.*, 114 Cal.App.4th 77 (C.A. 2003) – Arbitration agreement unconscionable where fees mandated to commence the arbitration are unaffordable by a consumer.
- *Mandel v. Household Bank (Nevada) National Association*, 105 Cal.App.4th 75 (Cal.App. Ct. 2003) – Provision of arbitration clause that barred class arbitration of disputes was so one-sided that it was unconscionable.

- *Harper v. Ultimo*, 113 Cal.App.4th 1402 (C.A. 4th 2003) – Arbitration clause was procedurally and substantively unconscionable where terms of arbitration limited party to the contract from obtaining damages for personal injuries and terms were not attached to contract.
- *Discover Bank v. The Superior Court of Los Angeles*, 105 Cal.App.4th 326 (C.A. 2003) – Provision of arbitration clause that barred class arbitration of disputes could not be challenged as unconscionable due to federal preemption.

F. *Damage*

- *Appling v. State Farm Mutual Automobile Insurance Company*, 340 F.3d 769 (9th Cir. 2003) – A contract between an insurance company and independent agents allowed termination “by written notice” and did not require good cause for termination. The company’s actions in deleting the phrase “with or without cause” from a prior version of the contract and adding a termination review provision did not operate to create such a “cause” requirement.
- *M. Perez Company, Inc. v. Base Camp Condominiums Association No. One*, 111 Cal.App.4th 456, 2003 SOS 4553 (Calif. Ct.App. 2003) – The reciprocity principle of Civil Code Sec. 1717, under which the prevailing party is entitled to contractual attorney fees if it would have been liable for attorney fees had its opponent prevailed, applies only if the validity of attorney fees provision of contract is litigated. A litigant uncertain of whether the contractual provision allows recovery of attorney fees may properly assert a fee claim based on the provision. The opponent may claim that the provision does not allow such recovery, without being estopped to assert a contrary position later. Where party would have been entitled to fees, but did not seek a fee award and did not appeal the judgment below, the claim to fees was waived.
- *Leamon v. Krajciwicz*, 107 Cal.App.4th 424, 132 CR2d 362 (C.A. 2003) – Although prevailing party would have been entitled to attorney fees under CC § 1717 (even though contract was invalid), that party’s failure to satisfy contractual condition precedent to suit by initiating mediation precluded fee award.

- *Harbor Island Holdings, L.L.C. v. Kim*, 107 Cal.App.4th 790, 2003 SOS 1735 (C.A. 2003) – A commercial lease provided that rent would double if the tenant was in breach of the lease. The term was an unenforceable “penalty.”
- *Atel Financial Corp. v. Quaker Coal Company*, 321 F.3d 924 (9th Cir. 2003) – Party to agreement could not recover liquidated damages where it did not suffer any loss of the bargain due to the parties continuing to perform under the contract following the other party’s default.

X. OTHER LAWS AFFECTING COMMERCIAL TRANSACTIONS

A. *Bankruptcy Code*

- *In re Silberkraus*, 336 F.3d 864 (9th Cir. 2003) – Where a bankruptcy could not have benefited the debtor, the bankruptcy court properly found a bankruptcy filing to be frivolous, even where the petition was well-grounded in law. The bankruptcy court properly found that the bankruptcy petition was filed for an improper purpose, where it was filed two days before a state court was to schedule a trial date to resolve a creditor’s claim against debtor for specific performance.
- *Pacific Gas and Electric Co. v. California*, 350 F.3d 932 (9th Cir. 2003) – Rejecting a whole-sale preemption of non-bankruptcy state law, the court examined the interplay of a reorganization plan under the Bankruptcy Code and utility regulation under state law.
- *In the Matter of Bertha McGee*, 353 F.3d 537 (7th Cir. 2003) – Where applicable law or a contract requires that a landlord treat the tenant’s security deposit as trust funds and, thus, creates a fiduciary duty, a landlord’s improper retention of a security deposit amounts to defalcation while acting in a fiduciary capacity under Bankruptcy Code § 523(a)(4) and is, therefore, not dischargeable.
- *HA-LO Indus., Inc. v. Centerpoint Props. Trust*, 342 F.3d 794 (7th Cir. 2003) – Bankruptcy Code § 365(d)(3) requires a debtor in possession that has elected to reject a non-residential real property lease to pay the full amount of rent due, where the lease in question does not provide for proration.
- *In re Essential Therapeutics, Inc.*, 295 B.R. 203 (Bankr. D.Del. 2003) – The court disqualified law firm from representing a corporation in bankruptcy (Bankruptcy Code § 101(14)(D)) because a law firm partner had served as secretary of the debtor within two years of the bankruptcy filing. The court concluded that screening the partner was insufficient and that the scope of the partner’s duties as secretary was irrelevant.

- *Fed. Communications Comm'n v. Nextwave Personal Communications, Inc.*, 537 US 293 (Sup. Ct. 2003) – Bankruptcy Code § 525 prohibits the FCC from removing licenses held by a debtor in bankruptcy upon the debtor's failure to make timely payments owed to the FCC for purchase of the licenses.
- *In re Condor Systems, Inc.; CEI Systems, Inc.*, 296 B.R. 5 (Bankr. 9th Cir. 2003) – The Bankruptcy Code § 502(b)(7) cap is calculated mechanically as of the date of the filing of the petition. Prepetition severance payments and pre- and postpetition draws on letters of credit may affect the amount of the claim, but not the Bankruptcy Code § 502(b)(7) cap.
- *In re Cellnet Data Sys., Inc.*, 327 F.3d 242 (3d Cir. 2003) – The purchaser of debtor's intellectual property expressly excluded a license agreement from its purchase. The purchase thus severed the benefits of royalties from associated licenses and the debtor was entitled to the royalties.
- *In re Incomnet, Inc.*, 299 B.R. 574 (Bankr. 9th Cir. 2003) – A recipient of funds from the debtor during the preference period was a “transferee” and not a “conduit” under the “conduit” theory. The recipient, a highly-regulated entity, received the funds in its own bank account.
- *Talbert v. City Mortgage Services (In re Talbert)*, 344 F.3d 555 (6th Cir. 2003) – Debtor who has filed for Chapter 7 cannot “strip off” an allowed junior lien where the senior lien exceeds the fair market value of the real property.
- *In re AR Accessories Group, Inc.*, 345 F.3d 454 (7th Cir. 2003) – State law granting superpriority for wage liens need not contain language expressly providing for retroactive perfection of the lien interest in order to fit within Bankruptcy Code § 546's exception to the automatic stay.
- *Precision Industries, Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537 (7th Cir. 2003) – A sale of a debtor's property pursuant to Bankruptcy Code § 363(f) stated to be “free and clear of all liens, claims, encumbrances and interests” extinguishes the possessory interest of a lessee in the property. The court concluded that Bankruptcy Code § 365(h), which protects a lessee's rights when debtor rejects a lease of estate property, does not override Bankruptcy Code § 363(f). The court further noted

- that a lessee in this circumstance was not without remedies, because it had the ability under Bankruptcy Code § 363(e) to seek adequate protection prior to the sale.
- *In re Conseco, Inc.*, 299 B.R. 875 (Bankr. N.D. Ill. 2003) – Bankruptcy Code § 524(e) does not bar the inclusion of consensual releases of non-debtors in a Chapter 11 plan.
 - *In re Alta+Cast, LLC*, 301 B.R. 150 (Bankr. De. 2003) – A provision in an employment contract requiring the debtor to repurchase an employee's equity interest if the employee was terminated for cause was a contract to repurchase equity as opposed to damages under an employment contract, and was thus subject to subordination under Bankruptcy Code § 510.
 - *In re Sarbjit Singh Thiara*, 285 B.R. 420; 2002 Bankr. LEXIS 1289 (9th Cir. 2002) – A debtor could have a nondischargable liability for conversion of collateral where the debtor used the collateral for purposes other than payment of the secured debt and did so with “wrongful intent.” Bankruptcy Code § 523(a)(2)(A).
 - *In re Stern*, 317 F.3d 1111 (9th Cir. 2003) – Pre-bankruptcy transfer of funds from non-exempt pension plan to exempt plan was not of itself a fraudulent transfer.
 - *Capital Factors, Inc. v. Kmart Corporation*, 2003 WL 22282518 (N.D. Ill. 2003) – “First-day orders” allowing payments to “critical vendors” not permitted by Bankruptcy Code.
 - *In re United Artists Theatre Company*, 276 F.3d 1109, 2002 U.S. App. LEXIS 275 (3rd Cir. 2003) – Debtor's retention agreement with financial advisor included indemnity agreement in favor of the advisor for liability incurred by the advisor in the event of its negligence. Agreement enforceable under Bankruptcy Code § 328.
 - *Platinum Capital Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.)*, 314 F.3d 1070, 2002 U.S. App. LEXIS 27123 (9th Cir. 2003) – Bankruptcy plan can be used to avoid default interest.

- *In re Adelphia Communications Corp.*, 2003 WL 23018802 (S.D.N.Y. 2003) – Proceeds of D & O insurance are not property of the bankruptcy estate of the corporation, unless they are used to reimburse the corporation for funds advanced to the directors and officers.
- *Thrifty Oil Co. v. Bank of America National Trust and Savings Association*, 322 F.3d 1039 (9th Cir. 2003) – Bankruptcy Code § 502(b)(2) does not disallow “termination damages” under an interest rate swap agreement as unmatured interest.
- *Mann v. Chase Manhattan Mortgage Corp.*, 316 F.3d 1 (1st Cir. 2003) – Secured party’s bookkeeping entries accruing legal fees against debtor did not violate automatic stay.
- *Archer v. Warner*, 538 U.S. 314, 123 S.Ct. 1462, 155 L.Ed.2d 454 (U.S. Supreme Ct. 2003) – Settlement of fraud claim pre-bankruptcy does not insulate creditor’s claim that debt is non-dischargeable under Bankruptcy Code § 523(a)(2)(A).
- *ITOFCA, Inc. v. MegaTrans Logistics, Inc.*, 322 F.3d 928, 2003 U.S. App. LEXIS 4024 (7th Cir. 2003) – Sale of debtor’s rights in software with court approval prevented infringement claim against buyer.
- *In re Andrew E. Bressman*, 327 F.3d 229 (3rd Cir. 2003) – Post-petition fees paid to law firm for debtor out of debtor’s estate would have to be returned if firm did not know facts that would put a reasonable person on notice of source of funds.
- *In re Trans World Airlines, Inc.*, 322 F.3d 283, 2003 U.S. App. LEXIS 4530 (3rd Cir. 2003) – Sale of debtor’s assets free and clear of claims prevents assertion of successor liability claims against buyer.
- *Cybergenics Corporation v. Chinery*, 330 F.3d 548 (3rd Cir. 2003) – Creditors committee has the right to assert an avoidance claim on behalf of the debtor.
- *Solow v. PPI Enterprises (U.S.) Inc., et al., In re PPI Enterprises (U.S.) Inc.*, 324 F.3d 197 (3rd Cir. 2003) – Lessor’s holding rejection claims subject to Bankruptcy Code § 502(b)(6) limits are not impaired for purposes of voting on a plan of reorganization.

B. Consumer

- *Kunert v. Mission Financial Services Corporation*, 110 Cal.App.4th 242, 2003 SOS 3578 (Calif. Ct. App. 2003) – A finance company agreed to pay a “reserve” or participation” fee – a portion of finance charges due under conditional sales contracts entered in to by a vehicle dealer and a purchaser and then assigned by dealer to a finance company. Because the transactions were not disguised loans by the finance company, the fees were not a “commissions or other remuneration” prohibited by the Rees-Levering Automobile Sales Finance Act.
- *Kaufman v. ACS Systems, Inc.*, 110 Cal.App.4th 886, 2003 SOS 3835 ____ (Calif. Ct. App. 2003) – A federal law banning the sending of unsolicited advertising materials by fax is enforceable by private action in states, such as California, which have not barred such actions by statute. Private suit under federal Consumer Protection Act of 1991 – which entitles recipient of “junk fax” to greater of actual damages or \$500 per fax, and permits treble damages for willful violation – may be brought as a class action. The junk fax statute does not violate the First Amendment right to engage in commercial speech, is not void for vagueness under the Due Process Clause, and does not impose excessive damages.
- *Olson v. Six Rivers National Bank*, 111 Cal.App.4th 1, 2003 SOS 4283 (Calif. Ct. App. 2003) – A bank making loan to a wife based on her financial statement setting forth property held jointly with her husband had a legitimate business need for credit information about the husband and did not violate California Consumer Credit Reporting Agencies Act by obtaining it.
- *Hussey-Head v. World Savings and Loan Association*, 111 Cal.App.4th 773, 2003 SOS 4782 (Calif. Ct. App. 2003) – A consumer brought an action against a lender claiming the lender had furnished incomplete and inaccurate information to credit reporting agencies. An expert testified that the lender did not conform to standards accepted in the industry.
- *Freeman v. Wal-Mart Stores, Inc.*, 111 Cal.App.4th 660 (Cal.App.4th 2003) – A store policy of debiting the balance of the store’s gift card at rate of \$1 per month if the card was not used within 24 months was not an unfair

business practice and did not effectively make the card subject to an expiration date in violation of California Civil Code § 1749.5.

- *Vega v. McKay*, 351 F.3d 1334 (11th Cir. 2003) – A creditor’s serving of papers in a legal action does not constitute an “initial communication” within the meaning of Section 1692g(a) of the Fair Debt Collection Practice Act and, therefore, does not require delivery of written debt verification information.
- *Horkey v. J.V.D.B. & Associates, Inc.*, 333 F.3d 769 (7th Cir. 2003) – A debt collector’s actions in telephoning a debtor violated the Fair Debt Collection Practices Act.
- *Silvio v. Ford Motor Company*, 109 Cal.App.4th 1205 (C.A. 2003) – Motor vehicle dealer gets two chances to make repairs before subject to claim under “lemon law.” California Civil Code §§ 1793 *et seq.*

C. *Professionals*

- *Wiz Technology, Inc. v. Coopers & Lybrand LLP*, 106 Cal.App.4th 1 (Calif. Ct. App. 2003) – Accounting firm was entitled to terminate engagement where audit client had failed to satisfy condition of engagement.
- *Viner v. Sweet*, 30 Cal. 4th 1282 (Calif. Supreme Ct. 2003) – Client’s action for malpractice against business lawyer must satisfy “but for” causation and show that loss would not have occurred with the attorney’s malpractice.

TABLE OF AUTHORITIES

	<u>Page</u>
 CASES	
<i>Agriliance, L.L.C. v. Runnells Grain Elevator, Inc.,</i> 272 F.Supp.2d 800, 51 UCC Rep Serv 2d 756 (S.D. Iowa 2003)	16
<i>AIH Acquisition Corp. LLC v. Alaska Industrial Hardware, Inc.,</i> 2003 U.S. Dist. LEXIS 11258 (S.D.N.Y. 2003).....	41
<i>Ainslie v. Inman,</i> 577 S.E.2d 246 (2003)	12
<i>Air Products and Chemicals, Inc. v. Eaton Metal Products Co.,</i> 2003 WL 1825069, 50 UCC Rep Serv 2d 419 (E.D.Pa. 2003).....	32
<i>Allco Enterprises, Inc. v. Goldstein Family Living Trust,</i> 51 P3d 1275, 48 UCC Rep. Serv. 2d 752 (Or. Ct. App. 2002).....	18
<i>Alpine Haven Property Owners Ass’n, Inc. v. Deptula,</i> 2003 WL 21361375, 51 UCC Rep Serv 2d 195 (Vermont Supr.Ct. 2003)	37
<i>American State Bank v. Union Planters Bank, N.A.,</i> 2003 WL 21361043, 50 UCC Rep Serv 2d 1157 (8 th Cir. 2003)	37
<i>Amwest Surety Insurance Co. v Concord Bank,</i> 2003 WL 553965, 50 UCC Rep Serv 2d 249 (E.D.Mo 2003)	39
<i>Ansley v. Ameriquest Mortgage Company,</i> 340 F.3d 858 (9 th Cir. 2003).....	21
<i>Appling v. State Farm Mutual Automobile Insurance Company,</i> 340 F.3d 769 (9 th Cir. 2003).....	44
<i>Arcadia Financial, Ltd. v. Southwest-Tex Leasing Co.,</i> 78 S.W. 3d 619, 47 UCC Rep. Serv. 2d 1371 (Tex. App. 2002)	4
<i>Archer v. Warner,</i> 538 U.S. 314, 123 S.Ct. 1462, 155 L.Ed.2d 454 (U.S. Supreme Ct. 2003)	49
<i>Ask Technologies, Inc. v. Cablescope, Inc.,</i> 2003 WL 22400201, 51 UCC Rep Serv 2d 1028 (S.D.N.Y. 2003)	28

<i>Atel Financial Corp. v. Quaker Coal Company</i> , 321 F.3d 924 (9 th Cir. 2003).....	44
<i>Automotive Finance Corp. v. Smart Auto Center, Inc.</i> , 2003 WL 21507868, 51 UCC Rep Serv 2d 297 (7 th Cir. 2003)	16
<i>Baird Credit Corp. v. Seher</i> , 2003 WL 1720029, 50 UCC Rep Serv 2d 591 (N.D.Ill. 2003)	19
<i>Bank of Am. v. Moglia</i> , 330 F3d 942 (7 th Cir. 2003).....	6
<i>Bank of America v. City and County of San Francisco</i> , 309 F.3d 551, 02 C.D.O.S. 10640 (9 th Cir. 2002)	26
<i>Bank One, N.A. v. The First National Bank of Baird</i> , 2003 WL 22137171 (N.D.Tx 2003).....	13
<i>Barak v. Obioha</i> , 2003 WL 21938623, 51 UCC Rep Serv 2d 468 (3 rd Cir. 2003)	36
<i>Beardmore v. American Summit Financial Holdings, LLC</i> , 351 F.3d 352 (8 th Cir. 2003)	18
<i>Benedek v. PLC Santa Monica, LLC</i> , 104 Cal.App.4 th 1351, 129 CR2d 197 (C.A. 2002)	42
<i>Beneficial National Bank v. Anderson</i> , 539 U.S. 1 (2003)	38
<i>Bescos v. Bank of America</i> , 105 Cal.App.4 th 373 (C.A. 2003)	35
<i>Bobb Forest Products, Inc. v. Morback Industries, Inc.</i> , 151 Ohio App.3d 63, 50 UCC Rep Serv 2d 106 (Ohio App. 2002)	30
<i>BOC Group, Inc. v. Chevron Chemical Company, LLC</i> , 359 N.J.Super. 135, 819 A.2d 431, 50 UCC Rep Serv 2d 489 (N.J.Super. 2003).....	32
<i>Brandt v. Boston Scientific Corp.</i> , 2003 WL 21290916, 50 UCC Rep Serv 2d 701 (Ill. Sup.Ct. 2003).....	28
<i>Business Communications, Inc. v. KI Networks, Inc.</i> , 2003 WL 21146640, 50 UCC Rep Serv 2d 799 (No.Car.App. 2003).....	33

<i>Capital Factors, Inc. v. Kmart Corporation</i> , 2003 WL 22282518 (N.D. Ill. 2003).....	48
<i>Carroll v. Interstate Brands Corporation</i> , 99 Cal.App.4 th 1168, 02 C.D.O.S. 5958 (2002).....	1
<i>Carter v. Four Seasons Funding Corporation</i> , 97 S.W.3d 387 (Ark. 2003).....	5
<i>Chateau Des Charmes Wines Ltd. v. Sabate USA Inc., Sabate S.A.</i> , 328 F.3d 528 (9 th Cir. 2003).....	42
<i>Chere Amie, Inc. v. Windstar Apparel Corp.</i> , 2003 WL 22056935, 51 UCC Rep Serv 2d 969 (S.D.N.Y. 2003)	31
<i>Chicago District Council of Carpenters Pension Fund v. Tessio Construction Co.</i> , 203 WL 21312664, 51 UCC Rep Serv 2d 268 (N.D. Ill 2003)	13
<i>Citizens National Bank v. Robertson</i> , 2003 WL 1484823, 50 UCC Rep Serv 2d 587 (Mo.App. 2003).....	19
<i>Coburn Supply Company, Inc. v. Kohler Co.</i> , 2003 WL 21802016, 51 UCC Rep Serv 2d 80 (5 th Cir. 2003).....	33
<i>Consolidated Nutrition, L.C. v. IBP, Inc.</i> , 2002 WL 32153954, 51 UCC Rep Serv 2d 329 (South Dakota Supr.Ct. 2003).....	13
<i>Controlled Environments Construction, Inc. v. Key Industrial Refrigeration Co.</i> , 2003 WL 22461949, 51 UCC Rep Serv 2d 1079 (Neb. Supr.Ct. 2003)	31
<i>Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.</i> , 2003 WL 21513366, 51 UCC Rep Serv 2d 364 (Ill.App. 2003).....	29
<i>Cryolife, Inc. v. Superior Court (Minvielle)</i> , 110 Cal.App.4 th 1145, 2003 SOS 3961 (C.A. 2003).....	30
<i>Cybergenics Corporation v. Chinery</i> , 330 F.3d 548 (3 rd Cir. 2003)	49
<i>Dean Machinery Co. v. Union Bank</i> , 2003 WL 1872958, 50 UCC Rep Serv 2d 431 (Mo.App. 2003).....	5
<i>Dean v. Hall</i> , 2003 WL 21650145, 50 UCC Rep Serv 2d 618 (E.D.Va. 2003)	20

<i>Decker v. Yorkton Securities, Inc.,</i> 106 Cal.App.4 th 1315, 50 UCC Rep Serv 2d 271 (Cal.App. 2003).....	39
<i>Deere Credit, Inc. v. Pickle Logging, Inc. (In re: Pickle Logging, Inc.),</i> 286 B.R. 181 (Bankr. M.D. Ga. 2002).....	7
<i>Deminsky v. Arlington Plastics Machinery,</i> 657 N.W.2d 411, 50 UCC Rep Serv 2d 53 (Wisconsin Supreme Court 2003).....	42
<i>Dieden v. Schmidt,</i> 104 Cal.App.4 th 645 (C.A. 1 st 2002)	21
<i>Duke Energy Royal, LLC v. Pillowtex Corporation (In re Pillowtex, Inc.),</i> 349 F.3d 711 (3d Cir. 2003).....	3
<i>DVD Copy Control Association, Inc. v. Bunner,</i> 31 Cal.4 th 864 (Cal.App.4 th 2003)	24
<i>Eplus Group, Inc. v. Panoramic Communications LLC,</i> 2003 WL 1572000, 50 UCC Rep Serv 2d 213 (S.D.N.Y. 2003)	34
<i>Estate of Freitag ex rel. Blackburn v. Frontier Bank,</i> 2003 WL 22039140, 51 UCC Rep Serv 2d 470 (Wash.App. 2003)	38
<i>Farm Bureau Mutual v. Combustion Research Corp.,</i> 2003 WL 1249314, 50 UCC Rep Serv 2d 67 (Mich.App. 2003).....	28
<i>Fed. Communications Comm’n v. Nextwave Personal Communications, Inc.,</i> 537 US 293 (Sup. Ct. 2003)	46
<i>First National Bank of Seminole v. Hooper,</i> 104 S.W.3d 83, 46 Tex. Sup Ct. J. 449 (Texas 2003).....	23
<i>First National Bank of the North v. Automotive Finance Corp.,</i> 2003 WL 21219989, 50 UCC Rep Serv 2d 915 (Minn.App. 2003)	9
<i>Fischer v. First International Bank,</i> 109 Cal.App.4 th 1433 (C.A. 2003)	21
<i>Flender Corp. v. Tippins International, Inc.,</i> 2003 WL 21957985, 51 UCC Rep Serv 2d 68 (Pa. Supr.Ct. 2003)	30
<i>Founding Members of The Newport Beach Country Club v. Newport Beach Country Club, Inc.,</i> 109 Cal.App.4 th 944, 135 CR2d 505 (C.A. 2003)	41

<i>Fragale v. Faulkner</i> , 110 Cal.App.4 th 229, 2003 SOS 3606 (Calif. 2003)	24
<i>Freeman v. Wal-Mart Stores, Inc.</i> , 111 Cal.App.4 th 660 (Cal.App.4 th 2003)	50
<i>Furr v. The Corvette Experience, Inc.</i> , 294 B.R. 409, 51 UCC Rep Serv 2d 426 (Bankr. S.D. Fla. 2003)	3
<i>Gator.com Corp. v. L.L. Bean, Inc.</i> , 341 F.3d 1072 (9 th Cir. 2003)	43
<i>Gavin W. v. YMCA of Metropolitan Los Angeles</i> , 106 Cal.App.4 th 662 (C.A. 2003)	42
<i>General Electric Capital Corporation v. Dial Business Forms, Inc., (In re Dial Business Forms, Inc.)</i> , 341 F.3d 738, 51 UCC Rep Serv 2d 815 (8 th Cir. 2003)	11
<i>Grabowski v. Deere & Company</i> , 277 B.R. 388 (Bankr. S.D. Ill. 2002)	7
<i>Grant v. Marshall</i> , 2003 WL 21683449, 51 UCC Rep Serv 2d 749 (N.Y. Supr.Ct. 2003)	37
<i>Greatamerica Leasing Corp. v. Star Photo Lab, Inc.</i> , 2003 WL 22438622, 51 UCC Rep Serv 2d 1133 (Iowa App. 2003)	35
<i>Grimes v. New Century Mortgage Corporation</i> , 340 F.3d 1007 (9 th Cir. 2003)	41
<i>Grynberg v. Questar Pipeline Co.</i> , 2003 UT 8, 50 UCC Rep Serv 2d 171 (Utah Supreme Court 2003)	32
<i>Gunther-Wahl Productions, Inc. v. Mattel, Inc.</i> , 104 Cal.App.4 th 27, 02 C.D.O.S. 11783 (C.A. 2 nd 2002)	41
<i>Gutierrez v. Autowest, Inc.</i> , 114 Cal.App.4 th 77 (C.A. 2003)	43
<i>Gyamfoah v. EG & G Dynatrend</i> , 2003 WL 22208725, 51 UCC Rep Serv 2d 805 (E.D. Pa. 2003)	40
<i>Haight v. Dales Used Cars, Inc.</i> , 2003 WL 22416394, 51 UCC Rep Serv 2d 1017 (Idaho App. 2003)	31

<i>HA-LO Indus., Inc. v. Centerpoint Props. Trust</i> , 342 F.3d 794 (7 th Cir. 2003).....	46
<i>Harbor Island Holdings, L.L.C. v. Kim</i> , 107 Cal.App.4 th 790, 2003 SOS 1735 (C.A. 2003).....	44
<i>Harold L. Bowers (dba HLB Techonolgy) v. Baystate Technologies, Inc.</i> , 320 F.3d 1316 (Fed. Cir. 2003)	3
<i>Harper v. Ultimo</i> , 113 Cal.App.4 th 1402(C.A. 4 th 2003).....	43
<i>HDM Flugservice GMBH v. Parker Hannifin Corp.</i> , 2003 WL 21402388, 50 UCC Rep Serv 2d 1053 (6 th Cir. 2003)	33
<i>Health Net of California, Inc. v Department of Health Services</i> , 113 Cal.App.4 th 224 (C.A. 2003)	42
<i>Hess Energy, Inc. v. Lightning Oil Co., Ltd.</i> , 2003 WL 21757273, 51 UCC Rep Serv 2d 1 (4 th Cir. 2003).....	34
<i>Higginbotham v. Dryvit Systems, Inc.</i> , 2003 WL 1528483, 50 UCC Rep Serv 2d 128 (M.D. NC 2003)	32
<i>Highland Capital, Inc. v. Franklin National Bank</i> , 350 F.3d 558 (6 th Cir. 2003)	25
<i>Holden Farms, Inc. v. Hog Slat, Inc.</i> , 2003 WL 22433336, 51 UCC Rep Serv 2d 986 (8 th Cir. 2003)	32
<i>Horkey v. J.V.D.B. & Associates, Inc.</i> , 333 F.3d 769 (7 th Cir. 2003)	51
<i>Hunter-McDonald, Inc. v. Edison Foard, Inc.</i> , 2003 WL 21003704, 50 UCC Rep Serv 2d 326 (No.Car.App. 2003).....	37
<i>Hussey-Head v. World Savings and Loan Association</i> , 111 Cal.App.4 th 773, 2003 SOS 4782 (Calif. Ct. App. 2003)	50
<i>Hutcherson v. Sears Roebuck & Co.</i> , 342 Ill.App.3d 109, 276 Ill.Dec. 127, 793 N.E.2d 886, 51 UCC Rep Serv 2d 653 (Ill.App. 2003)	28
<i>IB Melchior v. New Line Productions, Inc.</i> , 106 Cal.App.4 th 224 (C.A. 2003)	41
<i>Ileto v. Glock Inc.</i> , 349 F.3d 1191, 03 C.D.O.S. 9984 (9 th Cir. 2003).....	26

<i>Imex Intl. Inc. v. Wires Engineering Imex Intl., Inc. v. Co. Fi. Plast.,</i> 2003 WL 2013073, 50 UCC Rep Serv 2d 448 (Ga.App. 2003)	29
<i>IMI Norgren Inc. v. D&D Tooling & Manufacturing, Inc.,</i> 2003 WL 21501783, 51 UCC Rep Serv 2d 347 (N.D. Illinois 2003)	31, 33
<i>In Ferris, Baker Watts, Inc. v. Stephenson (In re: MJK Clearing, Inc.)</i> 293 F.Supp.2d 1003, No. 02-4775 RHK, 2003 U.S. Dist LEXIS 5954 (D. Minn. April 7, 2003)	9
<i>In re Adelphia Communications Corp.,</i> 2003 WL 23018802 (S.D.N.Y. 2003)	48
<i>In re Alta+Cast, LLC,</i> 301 B.R. 150 (Bankr. De. 2003)	48
<i>In re Andrew E. Bressman,</i> 327 F.3d 229 (3 rd Cir. 2003)	49
<i>In re AR Accessories Group, Inc.,</i> 345 F.3d 454 (7th Cir. 2003)	47
<i>In re Atlantic Orient Corp.,</i> 290 B.R. 456, 49 UCC Rep. Serv. 2d 1138 (Bankr. D.N.H 2003)	18
<i>In re AvCentral, Inc.,</i> 289 B.R. 170 (Bankr. D. Kan. 2003)	8
<i>In re Ball, Morris v. General Motors Acceptance Corp.,</i> 281 B.R. 706, 2002 WL 1827851, 48 UCC Rep Serv 2d 709 (Bankr. D.Kansas 2002)	20
<i>In re Cadiz Properties, Inc.,</i> 278 B.R. 744 (Bankr. D. Texas 2002)	17
<i>In re Cellnet Data Sys., Inc.,</i> 327 F3d 242 (3d Cir. 2003)	47
<i>In re Communications Dynamics, Inc.,</i> 300 B.R. 220 (Bankr. Del. 2003)	12
<i>In re Condor Systems, Inc.; CEI Systems, Inc.,</i> 296 B.R. 5 (Bankr. 9 th Cir. 2003)	47
<i>In re Conseco, Inc.,</i> 299 B.R. 875 (Bankr. N.D. Ill. 2003)	48

<i>In re Custer,</i> 2003 Bankr. LEXIS 272, 50 UCC Rep Serv 2d 608 (Bankr. N.D. Iowa 2003)	14
<i>In re Cypress Foods, Inc.,</i> 278 B.R. 622 (M.D. Florida 2002)	2
<i>In re Doctors Hospital of Hyde Park, Inc.,</i> 2003 WL 21730747, 51 UCC Rep Serv 2d 224 (7 th Cir. 2003)	13
<i>In re Downing,</i> 286 B.R. 900, 49 UCC Rep. Serv. 2d 983 (Bankr. W.D. Mo. 2002)	19
<i>In re Erwin,</i> 2003 WL 21513158, 2003 Bank. Lexis 692, 50 UCC Rep Serv. 933 (Bankr. D. Kansas 2003)	9
<i>In re Essential Therapeutics, Inc.,</i> 295 B.R. 203 (Bankr. D.Del. 2003)	46
<i>In re Exide Technologies, Inc.,</i> 299 B.R. 732 (Bankr. D.Del. 2003)	25
<i>In re E-Z Serve Convenience Stores, Inc.,</i> 2003 WL 22159042, 51 UCC Rep Serv 2d 858 (Bankr. M.D.N.C. 2003)	6
<i>In re Hergert, Hergert v. Bank of the West,</i> 275 B.R. 58, 47 UCC Rep Serv 2d 1 (D. Idaho 2002)	11
<i>In re Hylton v. Meztista,</i> 845 So. 2d 795, 51 UCC Rep Serv 2d 461 (Ala. Supr.Ct. 2003)	38
<i>In re Incomnet, Inc.,</i> 299 B.R. 574 (Bankr. 9 th Cir. 2003)	47
<i>In re Invenux, Inc.,</i> 298 B.R. 442 (Bankr. D.Co. 2003)	8
<i>In re K & P Logging, Inc., Bank of America, N.A. v. Case Credit Corp.,</i> 272 B.R. 867, 47 UCC Rep Serv 2d 731 (Bankr. D. S.C. 2001)	14
<i>In re Kellstrom Industries, Inc.,</i> 282 B.R. 787, 48 UCC Rep. Serv. 2d 613 (Bankr. D. Del. 2002)	6
<i>In re Kinderknecht,</i> 2003 WL 22345663, 51 UCC Rep Serv 2d 1234 (Bankr. D.Ks. 2003)	10

<i>In re Midland Transportation Co., Forker v. Prins Insurance Co. Inc.,</i> 292 B.R. 181, 50 UCC Rep Serv 2d 579 (Bankr. N.D. Iowa 2003)	6
<i>In re Moffett,</i> 288 B.R. 721, 48 UCC Rep. Serv. 2d 740 (Bankr. E.D. Va. 2002)	16
<i>In re Montgomery Ward Holding Corp.,</i> 326 F3d 383 (3d Cir. 2003)	34
<i>In re Nedwick Steel Company, Inc.,</i> 289 B.R. 95, 50 UCC Rep Serv 2d 736 (Bankr. N.D. Ill. 2003)	33
<i>In re Oracle Corp.,</i> 824 A.2d 917 (Del.Ch. 2003)	27
<i>In re Pacific/West Communications Group, Inc.; Fifteenth RMA Partners, L.P.</i> <i>v. Pacific/West Communications Group, Inc.,</i> 301 F.3d 1150 (9 th Cir. 2002)	1
<i>In re Pasteurized Eggs Corp.,</i> 2003 WL 21474218, 51 UCC Rep Serv 2d 274 (D. New Hampshire 2003)	3
<i>In re QDS Components, Inc.,</i> 292 B.R. 313, 50 UCC Rep Serv 2d 973 (Bankr. S.D. Ohio 2002)	4
<i>In re Rebel Rents, Inc., Zions Credit Corporation v. Rebel Rents, Inc.,</i> 2003 WL 1869889, 50 UCC Rep Serv 2d 352 (C.D.Cal 2003)	4
<i>In re Richards,</i> 275 B.R. 586 (Bankr. D. Colo, 2002)	3
<i>In re Robinson,</i> 285 B.R. 732, 49 UCC Rep. Serv. 2d 327 (Bankr. W.D. Okla. 2002)	16
<i>In re S.M. Acquisition Co.,</i> 296 B.R. 452, 51 UCC Rep Serv 2d 867 (Bankr. N.D.Ill. 2003)	20
<i>In re Sarbjit Singh Thiara,</i> 285 B.R. 420; 2002 Bankr. LEXIS 1289 (9 th Cir. 2002)	48
<i>In re Silberkraus,</i> 336 F.3d 864 (9 th Cir. 2003)	46
<i>In re Spearing Tool & Mfg. Co.,</i> 302 B.R. 351 (E.D. Mich. 2003)	10

<i>In re Stallings,</i> 290 B.R. 777 (Bankr. D. Idaho 2003)	15
<i>In re Stern,</i> 317 F.3d 1111 (9 th Cir. 2003)	48
<i>In re Stout,</i> 284 B.R. 511, 49 UCC Rep. Serv. 2d 626 (Bankr. D. Kan. 2002)	20
<i>In re Tower Air, Inc. Stanziale v. Finova Capital Corp.,</i> 2003 WL 21398007. 51 UCC Rep Serv 2d 219 (D. Del. 2003)	15
<i>In re Trans World Airlines, Inc.,</i> 322 F.3d 283, 2003 U.S. App. LEXIS 4530 (3 rd Cir. 2003)	49
<i>In re United Artists Theatre Company,</i> 276 F.3d 1109, 2002 U.S. App. LEXIS 275 (3 rd Cir. 2003)	48
<i>In re Valley Media, Inc.,</i> 279 B.R. 105 (Bankr. D. Del. 2002)	2
<i>In re Wiersma,</i> 283 B.R. 294, 49 UCC Rep. Serv. 2d 309 (Bankr. D. Idaho 2002)	15
<i>In the Matter of Argo Financial, Inc., Advanta Auto Finance Corp. v.</i> <i>Sugarland Motor Co., Inc.,</i> 2003 WL 21536985, 51 UCC Rep Serv 2d 282 (5 th Cir. 2003)	13
<i>In the Matter of Bertha McGee,</i> 353 F.3d 537 (7 th Cir. 2003)	46
<i>Intel Corporation v. Hamidi,</i> 30 Cal. 4 th 1342 (Calif. Supreme Ct. 2003)	26
<i>Intel Corporation v. VIA Technologies, Inc.,</i> 319 F.3d 1357, 2003 U.S. App. LEXIS 2730 (N.D. Cal. 2003)	41
<i>ITOFCA, Inc. v. MegaTrans Logistics, Inc.,</i> 322 F.3d 928, 2003 U.S. App. LEXIS 4024 (7 th Cir. 2003)	49
<i>Jaramillo v. JH Real Estate Partners, Inc.,</i> 111 Cal.App.4 th 394, 2003 SOS 4500 (Calif. Ct.App. 2003)	43
<i>Jasphy v. Osinsky,</i> 2003 WL 22490472, 51 UCC Rep Serv 2d 1215 (New Jersey App. 2003)	40

<i>John Hancock Financial Services, Inc. v. Old Kent Bank,</i> 2003 WL 22317379, 51 UCC Rep Serv 2d 595 (6 th Cir. 2003)	37
<i>Jones v. Wells Fargo Bank,</i> 112 Cal.App.4 th 1527, 2003 WL 22463968 (C.A. 2003)	38
<i>Kabehie v. Zoland,</i> 102 Ca.App.4 th 513 (C.A. 2002)	3
<i>Kaufman v. ACS Systems, Inc.,</i> 110 Cal.App.4 th 886, 2003 SOS 3835 (Calif. Ct. App. 2003)	50
<i>Keller v. Inland Metals All Weather Conditioning, Inc.,</i> 2003 WL 22024243, 51 UCC Rep Serv 2d 303 (Idaho Supr.Ct. 2003)	31
<i>Kelly v. Arriba Soft Corporation,</i> 336 F.3d 811 (9 th Cir. 2003)	3
<i>Kennedy v. Venrock Associates,</i> 348 F3d 584 (7 th Cir. 2003)	26
<i>Kesel v. United Parcel Service, Inc.,</i> 339 F.3d 849 (9 th Cir. 2003)	40
<i>Key Bank Nat. Ass'n v. Huntington Nat. Bank,</i> 47 UCC Rep Serv 2d 837 (Court of Appeals of Ohio 2002)	14
<i>King Jewelry, Inc. v. Federal Express Corp.,</i> 316 F.3d 961 (9 th Cir. 2003)	40
<i>Korea Supply Company v. Lockheed Martin Corporation,</i> 29 Cal. 4 th 1134 (Calif. Supreme Ct. 2003)	25
<i>Kunert v. Mission Financial Services Corporation,</i> 110 Cal.App.4 th 242, 2003 SOS 3578 (Calif. Ct. App. 2003)	49
<i>Leamon v. Krajcikewcz,</i> 107 Cal.App.4 th 424, 132 CR2d 362 (C.A. 2003)	44
<i>Lee v. Yang,</i> 111 Cal.App.4 th 481, 2003 SOS 4567 (Calif. 2003)	24
<i>Lippe v. Bairnco Corporation,</i> 249 F.Supp.2d 357 (S.D.N.Y. 2003)	23
<i>M. Perez Company, Inc. v. Base Camp Condominiums Association No. One,</i> 111 Cal.App.4 th 456, 2003 SOS 4553 (Calif. Ct.App. 2003)	44

<i>Mandel v. Household Bank (Nevada) National Association,</i> 105 Cal.App.4 th 75 (Cal.App. Ct. 2003)	43
<i>Mann v. Chase Manhattan Mortgage Corp.,</i> 316 F.3d 1 (1 st Cir. 2003)	49
<i>Marlow v. Conley,</i> 787 N.E.2d 490, 50 UCC Rep Serv 2d 712 (Ind.App. 2003)	33
<i>Marshall v. First Bank & Trust,</i> 2003 WL 21246496, 50 UCC Rep Serv 2d 860 (La.App.4 th 2003)	36
<i>McKesson HBOC, Inc. v. N.Y. State Common Retirement Fund, Inc.,</i> 339 F.3d 1087 (9 th Cir. 2003)	26
<i>McManus v. CIBC World Markets Corp.,</i> 109 Cal.App.4 th 76 (C.A. 2003)	43
<i>Mejia v. Reed,</i> 31 Cal.4 th 657 (Calif. Supreme Ct. 2003)	23
<i>Mercedes-Benz Credit Corp. v. Johnson,</i> 1 Cal.Rptr.3d 396, 51 UCC Rep Serv 2d 168 (Cal.App. 2d 2003)	35
<i>Messing v. Bank of America, N.A.,</i> 2003 WL 1793353, 50 UCC Rep Serv 2d 1 (Md.App. 2003)	36
<i>Metropolitan National Bank v. La Sher Oil Co.,</i> 101 S.W.3d 252, 51 UCC Rep Serv 2d 213 (Ark.App. 2003)	16
<i>Mitchell v. BBB Services Co., Inc.,</i> 261 Ga.App. 240, 582 S.E.2d 470, 51 UCC Rep Serv 2d 393 (Ga.App. 2003)	31
<i>Montgomery Ward, LLC v. Wiseknit Factory, Ltd.,</i> 2003 WL 1894742, 50 UCC Rep Serv 2d 563 (Bankr. D.Del. 2003)	39
<i>Morgan v. Crawford,</i> 2003 WL 21106260, 50 UCC Rep Serv 2d 373 (Ky.App. 2003)	37
<i>Moseley v. V Secret Catalogue, Inc.,</i> 537 U.S. 418 (U.S. Sup.Ct. 2003)	25
<i>Motors Acceptance Corporation v. Rozier,</i> 290 B.R. 910, 50 UCC Rep Serv 2d 313 (M.D.Ga. 2003)	16

<i>Net2Phone, Inc. v. Superior Court</i> , 109 Cal.App.4 th 583, 135 CR2d 149 (C.A. 2003)	43
<i>Nguyen v. Calhoun</i> , 105 Cal.App.4 th 428 (C.A 2003)	21
<i>Olcutt Intern. & Co., Inc. v. Micro Data Base Systems, Inc.</i> , 793 N.E.2d 1063, 51 UCC Rep Serv 2d 352 (Ind.App. 2003).....	29
<i>Olsen v. Santa Barbara's Gracious Living, Inc.</i> , 103 Cal.App.4 th 1377, 02 C.D.O.S. 11643 (C.A. 2002).....	40
<i>Olson v. Six Rivers National Bank</i> , 111 Cal.App.4 th 1, 2003 SOS 4283 (Calif. Ct. App. 2003)	50
<i>Omnicare, Inc. v. NCS Healthcare, Inc. et al.</i> , 818 A.2d 914, 2003 WL 1787943 (Del. 2003)	27
<i>Ostayan v. Nordhoff Townhomes Homeowners Association, Inc.</i> , 110 Cal.App.4 th 120, 2003 SOS 3564 (Calif. 2003)	24
<i>Pacific Gas and Electric Co. v. California</i> , 350 F.3d 932 (9 th Cir. 2003)	46
<i>Pacific State Bank v. Greene</i> , 110 Cal.App.4 th 375, 2003 SOS 3625 (Calif. Ct.App. 2003)	41
<i>Patapsco Designs, Inc. v. Dominion Wireless, Inc.</i> , 2003 WL 21939370, 51 UCC Rep Serv 2d 159 (D. Md. 2003)	32
<i>Pearl Investments, LLC v. Standard I/O, Inc; Chunn v. Daudelin</i> , 2003 WL 1741211, 50 UCC Rep Serv 2d 377 (D.Maine 2003)	29
<i>Pellandini v. Valadao</i> , 113 Cal.App.4 th 1315 (C.A. 2003)	21
<i>Peoples v. Sebring Capital Corp.</i> , 52 Fed. R. Serv. 3d 197 (N.D. Ill. 2002).....	1
<i>Philippine American Life Insurance v. Raytheon Aircraft Co.</i> , 2003 WL 1581523, 50 UCC Rep Serv 2d 399 (D.Ks. 2003).....	28
<i>Platinum Capital Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.)</i> , 314 F.3d 1070, 2002 U.S. App. LEXIS 27123 (9 th Cir. 2003)	48

<i>Plein v. Lackey,</i> 67 P.3d 1061, 50 UCC Rep Serv 2d 234 (Supreme Court of Washington 2003)	22
<i>Poindexter v. Morse Chevrolet, Inc.,</i> 2003 WL 21638231, 51 UCC Rep Serv 2d 37 (D. Ks. 2003)	34
<i>Precision Industries, Inc. v. Qualitech Steel SBQ, LLC,</i> 327 F.3d 537 (7th Cir. 2003)	47
<i>Pride Hyundai, Inc. v. Chrysler Financial Co., LLC,</i> 2003 WL 21242649, 51 UCC Rep Serv 2d 247 (D. Rhode Island 2003)	7
<i>Rampey v. Novartis Consumer Health, Inc.,</i> 2003 WL 21246560, 51 UCC Rep Serv 2d 117 (Alabama Supr.Ct. 2003)	30
<i>Reaves Brokerage Company, Inc. v. Sunbelt Fruit & Vegetable Company, Inc.,</i> 336 F.3d 410, 2003 U.S. App. LEXIS 12977 (5 th Cir. 2003)	5
<i>Regions Bank v. The Provident Bank, Inc.,</i> 2003 WL 22158774, 51 UCC Rep Serv 2d 579 (11 th Cir. 2003)	38
<i>Rodehorst v. Gartner,</i> 2003 WL 22319213, 51 UCC Rep Serv 2d 604 (Neb. Supr.Ct. 2003)	22
<i>Roque De La Fuente II v. Federal Deposit Insurance Corporation,</i> 332 F.3d 1208, (9 th Cir. 2003)	26
<i>Rowan v. Riley,</i> 2003 WL 21403350, 50 UCC Rep Serv 2d 1127 (Id.Supr.Ct. 2003)	22
<i>S.E.C. v. Credit Bancorp, Ltd.,</i> 279 F.Supp.2d 247, 2003 WL 22004831, 51 UCC Rep Serv 2d 492 (S.D.N.Y. 2003)	39
<i>Sagent Technology, Inc. v. Micros Systems, Inc.,</i> 2003 WL 21939365, 51 UCC Rep Serv 2d 59 (D. Md. 2003)	29
<i>Salter v. Al-Hallaq,</i> 2003 WL 1872991, 50 UCC Rep Serv 2d 348 (D.Ks 2003)	31
<i>Schmitz v. Firstar Bank Milwaukee,</i> 2003 WL 21499932, 50 UCC Rep Serv 2d 1143 (Wisc.Supr.Ct. 2003)	37
<i>Securities and Exchange Commission v. Hickey,</i> 322 F.3d 1123 (9 th Cir. 2003)	27

<i>Securities and Exchange Commission v. Wallenbrock and Associates,</i> 313 F.3d 532 (9 th Cir. 2002)	27
<i>Security National Partners, Limited Partnership v. Baxley,</i> 859 So. 2d 890 (La. Ct. App. 2 Cir. 2003)	6
<i>Sick, Inc. v. Motion Control Corp.,</i> 2003 WL 21448864, 50 UCC Rep Serv 2d 1021 (D.Minn. 2003)	28
<i>Silver v. Wilson (In re: Estate of Silver),</i> 2003 Mich. App. Lexis 1389, 50 UCC Rep. Serv. (Callaghan) 2d 1196 (Mich Ct.App. 2003)	8
<i>Silvio v. Ford Motor Company,</i> 109 Cal.App.4 th 1205 (C.A. 2003)	51
<i>Singleton v. American Security Bank of Ville Platte, Inc.,</i> 849 So.2d 72, 51 UCC Rep Serv 2d 789 (La.App. 2003)	36
<i>Small v. Fritz Cos.,</i> 30 Cal. 4 th 167 (Calif. Supreme Ct. 2003)	27
<i>Solow v. PPI Enterprises (U.S.) Inc., et al., In re PPI Enterprises (U.S.) Inc.,</i> 324 F.3d 197 (3 rd Cir. 2003)	49
<i>Standard Bent Glass Corp. v. Glassrobots Oy,</i> 2003 WL 21419202, 50 UCC Rep Serv 2d 1036 (3 rd Cir. 2003)	30
<i>State Street Bank and Trust Co. v. Lord,</i> 2003 WL 21697417, 51 UCC Rep Serv 2d 191 (D. Fla. 2003)	36
<i>Streetscenes v. ITC Entertainment Group, Inc.,</i> 103 Cal.App.4 th 233 (C.A. 2002)	25
<i>Superior Federal Bank v. Mackey,</i> No. CA02-1119, 2003 Ark. App. LEXIS 848 (Ark. Ct. App. Nov. 19, 2003)	24
<i>Superior Kitchen Designs, Inc. v. Valspar Industries (U.S.A.), Inc.,</i> 2003 WL 21002898, 50 UCC Rep Serv 2d 748 (D. Mass. 2003)	32
<i>Surgicore, Inc. v. Principal Life Insurance Co.,</i> 2002 WL 1052034, 48 UCC Rep Serv 2d 736 (N.D. Illinois 2002)	2
<i>Systran Financial Services Corp. v. Giant Cement Holding, Inc.,</i> 252 F. Supp. 2d 500, 50 UCC Rep Serv 2d 305 (N.D. Ohio 2003)	12

<i>Talbert v. City Mortgage Services (In re Talbert),</i> 344 F.3d 555 (6th Cir. 2003)	47
<i>Tex Enterprises, Inc. v. Brockway Standard, Inc.,</i> 2003 WL 1884168, 50 UCC Rep Serv 2d 317 (Supreme Court of Washington 2003)	30
<i>The Nostalgia Network, Inc. v. Lockwood,</i> 315 F3d 717 (7 th Cir. 2002).....	23
<i>The Provident Bank v. Morequity, Inc.,</i> 2003 WL 21361357, 50 UCC Rep Serv 2d 1205 (Ga.App. 2003)	36
<i>Thrifty Oil Co. v. Bank of America National Trust and Savings Association,</i> 322 F.3d 1039 (9 th Cir. 2003).....	49
<i>Tibco Software, Inc. v. Gordon Food Service, Inc.,</i> 2003 WL 21683850, 51 UCC Rep Serv 2d 102 (W.D. Mich. 2003)	33
<i>Top Rank, Inc. v. Gutierrez,</i> 236 F.Supp.2d 637 50 UCC Rep Serv 2d 76 (W.D. Texas 2001).....	28
<i>Usinor Industeel v. Leeco Steel Products, Inc.,</i> 209 F. Supp. 2d 880, 47 UCC Rep. Serv. 2d 887 (N.D. Ill. 2002)	4
<i>Vega v. McKay,</i> 351 F.3d 1334 (11th Cir. 2003)	50
<i>Viner v. Sweet,</i> 30 Cal. 4 th 1282 (Calif. Supreme Ct. 2003)	51
<i>Vornado PS, LLC v. Primestone Investment Partners, LP,</i> 821 A2d 296, 49 UCC Rep.Serv. 2d 1348 (Del. Ch. 2002)	17
<i>Watkins v. GMAC Financial Services,</i> 337 Ill.App.3d 58, 271 Ill.Dec. 389, 785 N.E.2d 40, 50 UCC Rep Serv 2d 899 (Ill.App.1 st 2003)	13
<i>Wells Fargo Bank Northwest, N.A. v. Taca International Airlines, S.A.,</i> 2003 WL 21180415, 50 UCC Rep Serv 2d 811 (S.D.N.Y. 2003)	34
<i>Williams v. The Dow Chemical Co.,</i> 2003 WL 1793026, 50 UCC Rep Serv 2d 403 (S.D.N.Y. 2003)	30
<i>Winter v. DC Comics,</i> 30 Cal. 4 th 881 (Calif. Supreme Ct. 2003)	26

<i>Wiz Technology, Inc. v. Coopers & Lybrand LLP</i> , 106 Cal.App.4 th 1 (Calif. Ct. App. 2003)	51
<i>Wolf v. Walt Disney Pictures and Television</i> , 106 Cal.App.4 th 625 (Calif. 2003).....	42
<i>Wortley v. Camplin</i> , 2003 WL 21448802, 50 UCC Rep Serv 2d 1178 (1 st Cir. 2003).....	39
<i>Zenith Electronics Corp. v. WH-TV Broadcasting Corp.</i> , 2003 WL 1627458, 50 UCC Rep Serv 2d 94 (N.D. Illinois 2003)	29

STATUTES

49 USC § 44107(a)(1).....	8
Bankruptcy Code § 101(14)(D)	46
Bankruptcy Code § 328	48
Bankruptcy Code § 362(b)(3)	12, 15
Bankruptcy Code § 363(e)	47
Bankruptcy Code § 363(f)	47
Bankruptcy Code § 365(d)(3)	46
Bankruptcy Code § 365(h)	47
Bankruptcy Code § 502(b)(2)	49
Bankruptcy Code § 502(b)(6)	49
Bankruptcy Code § 502(b)(7)	47
Bankruptcy Code § 510	48
Bankruptcy Code § 523(a)(2)(A).....	48, 49
Bankruptcy Code § 523(a)(4).....	46
Bankruptcy Code § 524(e)	48
Bankruptcy Code § 525	46
Bankruptcy Code § 544	2
Bankruptcy Code § 546	47
Bankruptcy Code § 552	15

California Civil Code § 1589	42
California Civil Code § 1668	42
California Civil Code § 1749.5	50
California Civil Code § 3521	42
California Civil Code §§ 1793	51
California Corporations Code § 705(e)(1)	17
California Financial Code § 1504.....	38
Civil Code Sec. 1717	44
Delaware GCL § 217(a)	17
Delaware General Corporation Law § 251	27
National Bank Act § 85	38
UCC § 4-402.....	36
UCC § 1-103	34
UCC § 1-201(30)	2
UCC § 1-201(37)	4
UCC § 1-203	19
UCC § 2-102.....	28, 29
UCC § 2-201(1)	29
UCC § 2-207	28, 30
UCC § 2-210	33
UCC § 2-309(3)	34
UCC § 2-312	31
UCC § 2-313	31
UCC § 2-316	31
UCC § 2-326 (former)	2, 3
UCC § 2-328	18
UCC § 2-401	5
UCC § 2-401(a)	5

UCC § 2-403	6, 33, 35
UCC § 2-702	6
UCC § 2-713	31
UCC § 2-714	33
UCC § 2-719	32
UCC § 2-725	31
UCC § 2A-305	35
UCC § 2A-407	35
UCC § 2A-523	34
UCC § 307	8
UCC § 3-104	22
UCC § 3-302	16
UCC § 3-309	36
UCC § 3-311	38
UCC § 3-406	37
UCC § 3-413	36
UCC § 3-419	22
UCC § 3-605	37
UCC § 4-104	36
UCC § 4-205	37
UCC § 4A-202	38
UCC § 5-109	39
UCC § 7-204	40
UCC § 7-307	40
UCC § 8-105	39
UCC § 8-115	39
UCC § 9-102(a)(20) (revised)	2
UCC § 9-102(a)(33)	8

UCC § 9-102(a)(47).....	2
UCC § 9-103(f) (revised)	14
UCC § 9-104 (former)	15
UCC § 9-108	7
UCC § 9-109(12)	2
UCC § 9-109(a)(3).....	12
UCC § 9-109(b)	3
UCC § 9-109(d)(8)	2
UCC § 9-110	6
UCC § 9-203	6, 20
UCC § 9-203(1)(a).....	20
UCC § 9-203(f)	6
UCC § 9-203(g)	3, 6
UCC § 9-301	8
UCC § 9-306 (former)	15, 16
UCC § 9-311(a)(1).....	8
UCC § 9-311(a)(2).....	9
UCC § 9-311(d).....	8, 9
UCC § 9-312 (former)	15
UCC § 9-317(e)	14
UCC § 9-318 (former)	13
UCC § 9-322(a)(2).....	5
UCC § 9-324	15
UCC § 9-324(b)(2)	11
UCC § 9-340	13
UCC § 9-402(8) (former)	11
UCC § 9-404(a)(1).....	12
UCC § 9-404(a)(1).....	12

UCC § 9-404(a)(2).....	12
UCC § 9-503(a)	10
UCC § 9-503(a)(1).....	10
UCC § 9-506	11
UCC § 9-506(c).....	10
UCC § 9-601(a)(1).....	19
UCC § 9-607	2
UCC § 9-610	17
UCC § 9-610(c)(2)	17
UCC § 9-611(c)(3)(B).....	11
UCC § 9-613	19
UCC § 9-614	19
UCC § 9-615(c).....	18
UCC § 9-620	17
UCC § 9-623	17
UCC § 9-626	19
UCC § 9-626(b)	19
UCC § 9-702	19, 20
UCC § 9-702	20
UCC § 9-702(a)	7, 17
UCC § 9-702(c).....	14
UCC § 9-703(a)	11
UCC § 9-703(b)(1)	20
UCC § 9-705(c).....	7, 10